Via email to Brent.Earnest@state.nm.us and U.S Mail

February 12, 2018

Hon. Brent Earnest
Cabinet Secretary
New Mexico Human Services Department
P.O. Box 2348
Santa Fe, NM 87504

Re: RFP #18-630-8000-0001 for Managed Care Organization Contractors for Centennial Care 2.0 ("RFP") - Protest

Dear Secretary Earnest:

This letter is submitted on behalf of WellCare of New Mexico, Inc. ("WellCare") regarding the protest it filed on February 5, 2018, relating to the above-referenced RFP. WellCare submitted requests for public records relating to the RFP from the New Mexico Human Services Department ("HSD") pursuant to New Mexico’s Inspection of Public Records Act ("IPRA") on January 19 and January 25, 2018. The records sought by WellCare were needed by WellCare to obtain information relevant to its protest. In responses dated February 2, 2018 and February 8, 2018, HSD provided certain records in response to some of the requests while records in response to many of the other requests are yet to be provided. As a result, WellCare did not have a full record of the procurement to evaluate for its protest.

Other requestors have received more complete information in response to identical IPRA requests. For example, in response to its request, Molina received a copy of the December 22, 2017 Scoring Summary that included all of the exhibits. The Scoring Summary provided to Molina included 1,653 pages. The version of the Scoring Summary provided to WellCare included only 26 pages and did not include any of the exhibits. In addition, it appears from email messages provided by HSD that UnitedHealthcare of New Mexico may have received documents on or about January 19, 2018, that were not provided to WellCare. WellCare is disadvantaged by such disparate treatment, including being disadvantaged in preparing its protest.

Further, certain responses to WellCare’s requests state that HSD’s counsel designated documents exempt from IPRA pursuant to attorney-client privilege. For example, in its
IPRA response cover letter dated February 2, 2018, HSD stated that “16 documents have been identified as attorney-client privileged communications and are being withheld from disclosure.” In addition, in its response to WellCare’s request dated February 8, 2018, for “[a]ll public records reflecting any communications (including, but not limited to, e-mail communications) either sent by, or received by, the Department, including its employees or agents, which communications relate to the RFP,” HSD stated that “[t]he Department has determined that thirty-five (35) documents are attorney-client privileged communications and has withheld these documents from disclosure.” WellCare respectfully requests a privilege log be provided to ascertain whether those documents should be given privileged status. WellCare should not have to rely on HSD’s own internal assessment of documents that may be relevant and necessary for WellCare’s protest.

RFP # 18-630-8000-0001 states that “any protest by an Offeror must be timely and conform to NMSA 1978, §13-1-172 and applicable procurement regulations,” and then states that the protest period runs fifteen calendar days after the contract award. However, inasmuch as WellCare does not have complete documents to prepare its protest due to HSD not providing complete responses to its IPRA requests, the protest period should not be so limited. Regarding the deadline for filing protests, NMSA 1978, § 13-1-172 provides in pertinent part as follows: “[t]he protest shall be submitted in writing within fifteen calendar days after knowledge of the facts and occurrences giving rise to the protest.” In *James Hamilton Constr. Co. v. State ex rel. State Highway & Transp. Dep’t*, 2003-NMCA-067, ¶ 13, 133 N.M. 627, the New Mexico Court of Appeals interpreted Section 13-1-172 to allow for a protest that commences when the bidder obtains knowledge of the facts supporting its protest, which is not necessarily the same date as a contract award or other action by a state agency. As such, WellCare reserves its right to supplement its protest within fifteen (15) calendar days of receipt of documents it has requested from HSD, or through discovery, if the documents provided warrant supplementation. WellCare will calculate the fifteen-day deadline in accord with Section 1.4.1.93 NMAC, which provides that the date of production is not counted, and deadlines on a weekend or holiday roll forward to the next business day.
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Respectfully submitted,

Laurus Law Group LLC

[Signature]

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cc. Christopher Collins, General Counsel, HSD  
Daniel Clavio, Procurement Manager, HSD