

NEBRASKA

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DEPT. OF HEALTH AND HUMAN SERVICES



Pete Ricketts, Governor

October 24, 2022

Andre R. Barry
Cline Williams Wright Johnson & Oldfather, L.L.P.
233 South 13th Street
1900 U.S. Bank Building
Lincoln, NE 68508-2095

Re: RFP 112209 O3 MANAGED CARE PROGRAM PROTEST OF AWARD

Mr. Barry:

The Nebraska Department of Health and Human Services (DHHS) received your letter dated October 7, 2022 regarding Community Care Health Plan of Nebraska, Inc. d/b/a/ Healthy Blue's (Healthy Blue) protesting this agency's intent to award for RFP 112209 O3. After careful review and consideration of the protest, supporting materials, and arguments on behalf of Healthy Blue, DHHS finds that the agency developed a fair and reasonable RFP and established and implemented appropriate procedures for evaluating the five proposals received in response to the RFP.

As a product of its adequate, thorough, and impartial evaluations of the proposals, DHHS issued its Notice of Intent to Award to United Healthcare of the Midlands, Inc. (United), Nebraska Total Care, Inc. (Centene), and Molina Healthcare of Nebraska, Inc. (Molina). None of their proposals should be deemed non-responsive or disqualified. After review of its own evaluation processes in light of the Healthy Blue protest DHHS finds no error or mistake in its evaluation of the proposals. Neither is there any evidence that DHHS acted arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives. The protest of the intent to award Managed Care Organization (MCO) agreements to United, Centene, and Molina is denied and DHHS will neither stay the award process nor implement a new RFP process.

Healthy Blue's protest largely falls into three broad categories. The first is that deficiencies in other proposals required disqualification and the second is that the scoring process was flawed while the third relates to public records requests pertaining to the RFP. To those allegations, DHHS specifically finds as follows:

I. A. DISQUALIFICATION OF MOLINA'S PROPOSAL AS NON-RESPONSIVE

In section I. A. of its protest, Healthy Blue contends that Molina's entire proposal should be disqualified as non-response because of alleged improprieties in disclosing subcontractors, work to be completed by Molina's corporate parent, and utilization of "in-house applications". DHHS has reviewed these contentions and concludes they lack merit and that they do not justify disqualification of the proposal.

DHHS notes that under RFP §VI. A. 10 specific information regarding subcontractors “should” be provided and that in applying the definition of “should” (RFP Glossary of Terms, pg. xv.) certain disclosures would be “[e]xpected; suggested, but not necessarily mandatory”. Through the question-and-answer process and associated amendment of the RFP, DHHS clarified that subcontractors “perform a portion of the work awarded” and that “[e]ntities who perform ancillary functions for an MCO are not ‘subcontractors’”. In exercising its discretion to accept the representations of Molina’s proposal, DHHS has no reason to doubt that Molina has adhered to these requirements in identifying subcontractors and in otherwise addressing functions of entities providing ancillary services.

One of Molina’s identified subcontractors is its parent, Molina Healthcare, Inc. (MHI). In critiquing the proposal evaluation process, Healthy Blue takes liberties with this disclosure and implies that MHI’s involvement with contract performance would be excessive. In doing so it apparently assumes every one of a range of identified functions would be performed by MHI and that 100 percent of each function would be delegated to Molina’s parent. Again, DHHS properly exercised its discretion to accept the representations of Molina’s proposal without making assumptions about the extent of Molina’s identified subcontractor parent in contract performance.

Healthy Blue advocates disqualification of Molina’s proposal for the way in which it references two “in-house applications or service resources: Molina HelpFinder and Molina Transportation Trip Management. At this point, prior to the actual implementation of these services, disqualification of a proposal because of a competitor’s critique of a description would not be a proper exercise of discretion.

I. B. DISQUALIFICATION OF CENTENE’S AND UNITED’S PROPOSALS (AND A COMMENT ABOUT MOLINA’S) FOR FAILURE TO COMPLY WITH RFP REQUIREMENTS

In section I. B. of its protest Healthy Blue contends each successful bidder should be disqualified because of the way it disclosed criminal or civil governmental investigations of its activities, which is required pursuant to RFP §VI. A. 7. Each of the bidders made disclosures which were evaluated and given appropriate weight by the DHHS. In doing so, the DHHS properly exercised its discretion to conclude that disclosures were adequate and that disqualification is not warranted. Healthy Blue’s protest does not add to this evaluation and does not justify the requested disqualification.

Healthy Blue asserts that various settlements entered into by Centene affiliates with governmental authorities should have been disclosed and that non-disclosure was of such significance that disqualification was appropriate. Centene--in its response to Healthy Blue’s protest--has explained that, while it has paid money in no-fault settlements to governmental entities, these were proactive resolutions matters achieved to avoid investigation and litigation. Nothing in Healthy Blue’s challenge of Centene’s disclosures justifies that the DHHS revise its evaluation of Centene’s proposal.

United made disclosures of litigation activities pursuant to RFP §VI. A. 2. and by referring to UnitedHealth Group’s Form 10-K filing. Healthy Blue takes issue with this manner of disclosure of governmental investigations and refers to four news items which it asserts should have been specifically disclosed. In reviewing the actual disclosures made by United, the DHHS did not find its disclosures to be misleading. The additional material

provided by Healthy Blue in its protest does not necessitate revision of this conclusion. Furthermore, it would be within the discretion of the DHHS to waive a deviation or error in disclosure, such as that referenced in the protest against United, as not being material, not compromising the bid solicitation process, or improving a bidder's competitive position. (See RFP §I. V. 3.)

Healthy Blue suggests that Molina's description of state and federal investigations is defective because disclosure of this information is redacted from the publicly available version of its proposal. DHHS considered the entire proposal, including material redacted from public disclosure. Healthy Blue's challenge is, essentially, of the redaction process, not a challenge of Molina's actual submission. Healthy Blue points neither to any of Molina's disclosures of investigations nor to actual knowledge of investigations of Molina that would justify disqualifying or rescored Molina's proposal. Speculation that information of this sort exists does nothing to refute the presumption that DHHS properly considered Molina's disclosures.

I. C. DHHS'S SCORING PROCESS

Healthy Blue asserts in section I.C of its protest that DHHS failed to follow its own guidance in evaluating bidders' proposals and that, had it done so it would have resulted in disqualification of Molina, Centene, and United. This argument is premised on Healthy Blue's conclusion that the proposal of each awardee was insufficient or incomplete and that disqualification was therefore required. As explained above, under the fair and impartial evaluation of DHHS's evaluators, this was not the case and disqualification was not required.

Healthy Blue attempts to portray its disagreement with the evaluators' conclusion that the Molina, Centene, and United proposals were complete and responsive as a systemic failure of the evaluation process itself (rather than a disagreement with the conclusion drawn by application of the process to these specific proposals). In making this argument—and by citing RFP § II, p. 10-- Healthy Blue would impose mandatory rejection of the awardees' proposals. It therefore characterizes scoring of the challenged proposals as a systemic failure.

Since the argument is premised upon an objective determination that proposals were complete and entitled to be scored, the argument collapses into a challenge of the way in which scoring was done, not a challenge of the process itself.

Healthy Blue also criticizes DHHS's disclosure of guidance that was given to evaluators regarding the RFP scoring process. While there is no requirement that DHHS do so, it is perfectly willing to describe training and instruction that was given to evaluators in order to assure a fair process. Specifically, before the round of pass/fail scoring, there were five scoring training sessions provided to participants on June 13, 15, 27, 30 and July 6, 2022. The sessions on June 13 and 15 had a power point presentation to all participants about the RFP process, what pass/fail scoring meant, how to score, and other portions of the process. The sessions on June 27, 30, and July 6 were a refresher training of those power points or a forum for questions about how to properly complete scoring assignments. Multiple meetings were conducted to make sure anyone who was out of office for one meeting would be available to receive a live training session. Following the completion of the pass/fail scoring, on July 14, 2022, a scoring training session for the scoreable portion of the RFP was completed. This training was only for those individuals involved in the next phase of the RFP scoring process. Lastly, on September 6, 2022, oral interview training was presented to participants in the scoring of oral interview sessions.

Overall, each of the three different segments of RFP scoring had its own training sessions. These sessions were provided within a week prior to the scoring of each segment to make sure training would be fresh and timely.

Neither DHHS's absence of automatic disclosure of its evaluator training schedule nor its election to summarize that schedule in the preceding two paragraphs justifies a protest by an unsuccessful bidder or a change in the results of the RFP process.

I. D. DHHS'S PROVIDING DOCUMENTS TO HEALTHY BLUE

In section I. D. of its protest, Healthy Blue asserts, essentially, that it cannot properly prepare a protest or appeal because it has not gotten all the documents it wants from DHHS's files and records. It characterizes its lack of information as a violation of fundamental fairness principles. This assertion is without merit. The RFP process is not litigation and Nebraska's public contracting law does not contain discovery provisions. DHHS is not obligated to automatically produce records or explain its proceedings in this or any other RFP process. Rather its obligation is to conduct a fair, impartial, and non-prejudicial contracting process.

Healthy Blue complains about not having access to the DHHS's evaluation training materials, DHHS emails, communications, evaluation documents, and instructions for evaluating RFP proposals. Since DHHS has no independent duty to spontaneously produce such documentation, Healthy Blue served a public records request on September 23, 2022, the day it learned it was an unsuccessful bidder on the MCO RFP. This request is separate and distinct from the RFP process. It is governed by the Nebraska Public Records Statutes, Neb. Rev. Stat. §§84-712 through 84-712.09. In response to Healthy Blue's records request, and as a consequence of the volume of responsive documents, DHHS provided a timely explanation of how it could comply on September 29, 2022 (the fourth business day after service of the request, as required by Neb. Rev. Stat. §84-712 (4)). In doing so it explained the extensiveness of the request, a date by which it could comply, an estimate of the cost of compliance, and an opportunity for modification or prioritization of the items on the request.

All of these record production activities take place independently from the RFP process. If Healthy Blue is dissatisfied with DHHS's response and compliance with the request, it is entitled under Neb. Rev. Stat. §84-712.03 to seek speedy judicial relief by petitioning for a writ of mandamus or by petitioning the Nebraska Attorney General for assistance in resolving non-compliance issues, including the assistance of filing suit against DHHS. DHHS finds these allegations are without merit.

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CONCLUSION

Based on careful consideration and review of all relevant information, DHHS finds no reason to overturn the award. It is the agency's determination that the contract awards will stand and the protest submitted by Healthy Blue is hereby denied.

Sincerely,



Larry Kahl, COO
Department of Health and Human Services