



December 29, 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—Reconsideration of Denial of Healthy Blue’s Protest

Mr. Barry:

On behalf of the Nebraska Department of Health and Human Services (DHHS), I reviewed your November 7, 2022 letter 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 (the RFP). I also considered the oral presentation by Healthy Blue’s representatives at DHHS’s offices on December 6, 2022. Additionally, I considered your original October 7, 2022 protest letter and the supplemental documentation you submitted on December 9, 2022.

After careful review and evaluation of the protest, supporting materials, and arguments made on behalf of Healthy Blue, DHHS concludes that its Medicaid Managed Care Organization (MCO) Request for Proposal 112209 O3 process was properly conceived, developed, and implemented. The protest process for the RFP was properly administered. The proposals of all RFP bidders were properly scored; there was no error or mistake in evaluating the proposals. None of the proposals will be disqualified or rescored. There is no evidence that DHHS acted arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives. The Healthy Blue protest--requesting that the Notice of Intent to Award be invalidated, that bidders be disqualified, or for a re-procurement of services--is denied.

In its December 6, 2022 protest, Healthy Blue asserted that: 1) DHHS’s RFP process was flawed; 2) DHHS’s protest procedure is improper, and 3) DHHS’s evaluation and scoring of proposals by United Healthcare of the Midlands, Inc. (United), Nebraska Total Care, Inc. (Centene), and Molina Healthcare of Nebraska, Inc. (Molina) was erroneous. DHHS responds to these assertions with the following:

I. ALLEGATION OF FLAWED REQUEST FOR PROPOSAL PROCESS

Healthy Blue initially noted in its protest that the manner of scoring the present 2022 RFP is different from the manner of scoring for Nebraska’s last Medicaid MCO RFP in 2015. Specifically, the number of current RFP questions evaluated on a pass/fail basis was increased and the number of technical questions scored on a point scale was decreased. The effect of this change is that each numerically scored question has greater value in the 2022 RFP than it did in the 2015 RFP. Healthy Blue implies that this change in emphasis disadvantaged it and speculates that if scoring had not changed, it would have gotten a higher score and been awarded a contract.

This scoring methodology was part of the RFP planning process, developed long before publication of the RFO or receipt of proposals, and it applied equally to all bidders. In designing the scoring methodology, DHHS identified a number of threshold issues which did not significantly differentiate between the bidders who satisfied the threshold. Identification of these issues warranted a greater number of questions being given pass/fail status. Greater weight was therefore given to numerically scored issues which more effectively differentiated between the bidders. As a result, the scoring methodology used is better able to identify the most qualified bidders. The scoring change was not accidental. Rather it was a reasonable exercise of discretion made after consultation with an independent consultant named Civic Initiatives. It intentionally focused the selection process on scored aspects of MCO's proposals, where meaningful differences were likely to exist, and not on pass/fail industry standards where all proposals were likely to show generic characteristics.

While four of the five bidders' scores were very close, the scoring system produced clear, objectively verifiable, rationally chosen successful bidders. Healthy Blue takes issue with DHHS's RFP process for not producing greater scoring separation between the respective bidders. Such criticism fails to acknowledge that, notwithstanding the compressed scoring range for the four competitive bidders, the system successfully identified the three most appropriate MCO candidates. Likewise, this criticism fails to acknowledge that large, sophisticated managed care organizations--each experienced in nationwide Medicaid issues--predictably would each produce competitive proposals.

Healthy Blue asserted that because it utilizes a higher proportion of pass/fail issues as compared to scored issues, Nebraska's scoring methodology differs from that of other states. However, this characteristic does not make Nebraska's RFP process arbitrary or capricious. No bidder gained an advantage over another because of the manner in which the proposals were scored; all bidders participated in the same process. There is neither evidence nor logic which supports Healthy Blue's assertion that somehow having fewer scored questions necessarily means an increase in subjective bias or arbitrary and capricious results. In its protest, Healthy Blue contended DHHS's scoring change inserted potential bias into the RFP process and that without justification the change was an abuse of discretion. However, there is no requirement that changes in the scoring methodology from a prior RFP be explained as part of a protest response.

Healthy Blue also asserted that a lack of guidance and training of evaluators resulted in inconsistent scoring. In fact, each evaluator executed a bid review agreement that contained an outline of expectations. DHHS then conducted evaluator training for each evaluation stage: the pass/fail stage, the scoring stage, and the oral presentation stage. Each training included slides and a live presentation by the designated RFP contact, Greg Walklin. Evaluators attended the trainings and were able to ask questions of the designated RFP contact. As well, the designated contact answered evaluator questions and provided clarifications via email or phone as such questions arose. Healthy Blue provides nothing to support its assertion of inadequate evaluator guidance and training.

Healthy Blue referred to the report of Ikaso Consulting, prepared pursuant to Nebraska's 2022 L.B. 1037, as support for its protest. However, the Ikaso report, which did not exist at the time of the RFP or the notice of intent to award, contains nothing to suggest that DHHS failed to follow existing statutes, regulations, and policies relating to public procurement or that the existing process is fatally flawed. On the contrary, the report noted that while overall processes could be adjusted to better meet the needs of the state and its constituents, current Nebraska procurement practices do not diverge significantly from nationwide practice. The report focused on standardizing Nebraska's procurement process statewide and not on any particular RFP. DHHS followed the

state's process as it existed at the time of the bid. Whether the legislature, the Department of Administrative Services, or DHHS choose to implement any of the recommendations contained in the report for future procurement activities has no bearing on the instant protest.

Healthy Blue speculated that if a different scoring system were used, it would have been successful. Its unsupported speculation that it would have been successful under some other scoring system does not justify overturning the award. More realistically, Healthy Blue's objection to the scoring system seems to be dissatisfaction with the award result, and not the process itself.

II. ALLEGATION OF IMPROPER PROTEST PROCEDURE

In its November 7, 2022 letter Healthy Blue contended that the RFP protest process is improper. In doing so it contended it should not have to pursue the protest process (outlined in §6.20 of the State of Nebraska Procurement Manual) without first receiving all records it requested pursuant to the Nebraska Public Records Statutes, Neb. Rev. Stat. §§84-712 through 84-712.09. On the same day it learned it was an unsuccessful bidder on the MCO RFP, September 23, 2022, Healthy Blue served a public records request on DHHS, seeking a detailed and comprehensive set of documents relating to the RFP. While DHHS timely responded to the request, produced many responsive documents, and identified the cost and expense of final production, Healthy Blue was dissatisfied with what it received. It then, on November 4, 2022, addressed a letter to the Office of the Nebraska Attorney General petitioning that it take action to compel production of documents by DHHS. In its November 21, 2022 response, the Office of the Attorney General affirmed that DHHS had complied with its production responsibilities and that Healthy Blue had not been denied access to public records.

The Attorney General's response is consistent with the distinction that exists between an RFP protest and a public records request. The RFP protest process does not include a discovery or litigation-style document production component. Consequently, Healthy Blue's dissatisfaction with DHHS's good faith efforts to satisfy an unsuccessful bidder's request for records does not constitute a basis for challenging the RFP process itself.

Healthy Blue also asserted in its November 7, 2022 letter that the manner in which DHHS obtained and disclosed additional information from United, Molina, and Centene relevant to Healthy Blue's October 7, 2022 protest was improper. In a memorandum dated October 13, 2022, DHHS's Greg Walklin requested information from other bidders relevant to Healthy Blue's then-pending October 7, 2022 protest. Those bidders' responses to the memorandum were publicly posted on October 24, 2022. Healthy Blue implies that, because a denial of its original protest issued on the same day as the posting of other bidders' responses (October 24, 2022) it was not able to counter the responses. However, the present protest—framed by Healthy Blue's November 7, 2022 letter and the oral presentation on December 6, 2022—has given ample opportunity to address the assertions of the other bidders. There was no violation of law, regulation, or policy that occurred in the process of requesting and making public United's, Molina's, and Centene's positions regarding the October 7, 2022 protest. Healthy Blue's challenge of the RFP process on this ground is therefore unfounded.

In Molina's proposal, the resume of Ryan Sadler, who is scheduled to become Molina's plan president, identifies DHHS CEO Dannette Smith as a reference. Healthy Blue cites this as evidence of a shortcoming in DHHS's "protest or other procedures necessary to ensure that scores are not based on favoritism, bias, or the like, or to eliminate the appearance of impropriety". No evidence has been shown of an improper connection

between Mr. Sadler and DHHS. No bias in favor of Molina—or any other bidder—was identified by a consultant engaged to review scoring of the proposals. A single resume reference, standing by itself, falls far short of demonstrating favoritism, bias, or impropriety in the award.

III. MOLINA'S PROPOSAL

a. Disclosure of Subcontractors

Healthy Blue asserted that Molina failed to properly identify subcontractors which it intends to use in performing the MCO contract. From this assertion it concluded that Molina's RFP proposal should be disqualified or that an unspecified number of points should be deducted from its score. The theoretical effect of disqualification or point reduction is that Healthy Blue would move into the third position among bidders and that it would be one of the contract awardees.

The RFP, in §VI. A. 10. (pg. 175), requires a bidder to identify subcontractors it intends to use during contract performance along with the percentage of performance hours to be provided by each subcontractor and the total percentage of performance hours which will be provided by subcontractors. During the RFP's question-and-answer phase DHHS clarified that entities which are intended to perform ancillary functions for an MCO are not "subcontractors".

Molina responded to §VI. A. 10. by listing five subcontractors. Other bidders listed fourteen (Centene), twenty-eight (United Healthcare), and thirty-six (Healthy Blue) subcontractors. From these facts Healthy Blue argued, variously, that DHHS evaluators should have been skeptical of a low number of subcontractor disclosures by Molina, that Molina "deceptively declined to disclose" subcontractors because they were improperly characterized as providing ancillary functions, and that entities referenced elsewhere in Molina's proposal should have been identified as subcontractors.

While Healthy Blue criticized Molina's disclosure of subcontractors, the reality is that Molina satisfied this corporate overview subdivision of the Technical Proposal. There is neither a minimum nor a maximum number of disclosed subcontractors which would either disqualify a proposal or which would make a proposal suspicious. The purpose of the disclosure is to give DHHS an opportunity to understand how a bidder's performance would be achieved. Different bidders would be expected to have different mixes of subcontractors. The implication of Healthy Blue's arguing that Molina's listing five subcontractors suspiciously differs from other bidders' disclosures is that some minimum number of subcontractors is favored or required. This is not the case. Nor is it the case that some maximum number of subcontractors is too many. Disqualification or down-scoring of a proposal simply because of the number of subcontractors disclosed in the proposal is not supported by logic or any requirement of the scoring process.

Healthy Blue contended that an entity intended to provide "any part of...performance" must be disclosed as a subcontractor. With this contention, Healthy Blue disregarded the question-and-answer clarification that the performance of ancillary functions does not raise an entity to the level of a "subcontractor" requiring disclosure. Healthy Blue apparently does not distinguish between an "ancillary function" and "any performance". Presumably Healthy Blue chose to disclose all "ancillary function" providers as subcontractors, which may account for its disclosing the highest number (36) of subcontractors of any bidder. This disclosure decision by Healthy Blue is not wrong and it was not penalized for its disclosure.

Healthy Blue cited to several points in Molina's proposal where there are references to anticipated interactions with other entities. It chose to characterize these interactions—since they are not listed as subcontract relationships—as deceptive. However, as explained on pages 6 and 7 of Molina's response to Healthy Blue's protest (Thomas J. Kenny's October 18, 2022 letter to Greg Walklin) none of these referenced entities meets the definition of a "subcontractor" requiring disclosure. As stated by Molina, these entities had status as a potential (but not confirmed) vendor, a provider of community enhancement (but not a subcontractor), a repository of credentialing data, and an example of a local organization partner in another jurisdiction (not Nebraska) for a different program where Molina provides services.

DHHS's exercise of discretion in order to analyze subcontractor disclosures and analyze references to other entities with which Molina has had or may have interactions was appropriate, particularly in a context such as this MCO RFP where evaluators were experienced and knowledgeable. Healthy Blue made no showing that any aspect of DHHS's subcontractor analysis was arbitrary or the result of favoritism, ill will, fraud, or collusion.

The essence of Healthy Blue's criticism of Molina's subcontractor disclosures is that they should not be trusted by DHHS. Despite Molina's disclosures being different from the manner in which Healthy Blue made its disclosures, nothing makes them inherently unbelievable.

b. Parent Corporation's Providing Services

In its proposal Molina disclosed that its parent, Molina Healthcare, Inc. (MHI), would be a subcontractor providing 3.5-4.0% of the services necessary to fulfill Nebraska's Heritage Health contract. Healthy Blue challenged this assertion; it contended that this simply is not true, that the reality of MHI's involvement will be much greater, and that this involvement will be from locations outside the state of Nebraska. Healthy Blue essentially asserted that DHHS should not believe Molina's representations regarding MHI's involvement. Based on its **prediction** that Molina's representations are false, and that its own vision of a future in which MHI will have a far greater role in contract execution than is represented in Healthy Blue's proposal, Healthy Blue demanded disqualification of the entire Molina proposal.

In an effort to support its vision of how Molina will utilize MHI to execute the Nebraska MCO contract, Healthy Blue cited information from a Molina Healthcare of Mississippi, Inc. proposal, which is neither part of the documentation submitted by any bidder nor included as material supporting Healthy Blue's RFP protest. Based on its selective use of information from the Mississippi proposal—stating that MHI provides 37.7% of Molina's effort in Mississippi--Healthy Blue challenged Molina's representation to DHHS that 3.5-4.0% of its effort would be provided by MHI.

This comparison does not establish an equivalence of the Mississippi and Nebraska programs, the respective states' requests for proposals, or Molina's responses to the two states' requests. Consequently, the argument lacks the foundation necessary to use the Molina Mississippi proposal as basis for challenging Molina's Nebraska proposal. Additionally, DHHS's evaluators had no obligation to seek out, analyze, and compare Molina's submissions in Mississippi or any other jurisdiction when scoring and evaluating its Nebraska MCO RFP proposal. Imposing such a requirement on DHHS's evaluators would create an impractical duty to independently scour the country in search of information that would contradict a bidder's submission. This burden would make the MCO selection process overwhelmingly protracted and complicated.

DHHS's evaluators were entitled to consider the representation at face value. Even now, after Healthy Blue's commentary on Molina's Mississippi program, nothing has emerged which would require a change in DHHS's evaluation of the Molina proposal. It is only speculation that Molina's use of MHI services in Nebraska would deviate from its proposal to DHHS. There was no information submitted to the evaluators at the time of the bid—and there has been no reliable information submitted subsequently by Healthy Blue—that necessitated disqualification of Molina for the manner in which it disclosed MHI's anticipated involvement in performance of the Nebraska contract.

c. Location of Key Staff in Nebraska

The RFP, in section V. D. 2. (and in associated Table 1), pgs. 39-44, identifies Key Staff Positions which the MCO must fill. Sixteen of these twenty-four staff members must be based in Nebraska. Healthy Blue contended that Molina will not satisfy this based-in-Nebraska requirement. In doing so it cited no specific representation or statement to this effect by Molina, but rather construed Molina's comments about certain staff members currently being located out of state as commitments to maintaining them in those locations. Disqualification or significantly reduced scoring of Molina's proposal would be Healthy Blue's remedy for this circumstance. This argument appears to be a tortured interpretation of Molina's proposal; it fails to account for the reality of MCO staffing.

Molina currently is not one of Nebraska's Medicaid MCOs; it does not have operations in the state which will immediately be converted to this MCO contract. DHHS's understanding of Molina's transition to filling Key Staff Positions is that personnel will be employed from within the state or they will transfer to the state in order to fill required positions. The RFP does not prohibit such a transition. Indeed, it would seem unusual that an MCO which is new to the state would have established staff personnel in the state. The implication of Healthy Blue's argument seems essentially to be that only incumbent MCOs would be able to fulfill the resident Key Staff Positions requirement of the RFP. Such an interpretation would stifle competition and the introduction of new bidders which should yield better Medicaid care for Nebraska's citizens.

IV. UNITED'S PROPOSAL

Section VI. A. 7. of the RFP (RFP pg. 174) requires bidders to disclose contract performance, and criminal or regulatory investigations or sanctions. All of the bidders' proposals, including Healthy Blue's, contained disclosures in response to these requirements. Healthy Blue asserted that United's proposal should be disqualified because it did not provide the required disclosures. It particularly took issue with United's disclosures of "investigations". However, United specifically addressed investigations by stating that it did not have any state or federal criminal or civil investigations to report for the past five years relating to its Medicaid business, but that its SEC Form 10-K would contain information about threatened or pending investigations that would materially affect its performance of RFP operations. (United Proposal, §VI. A. 7., pg. 7 of 80, PDF pg. 33.) Additionally, United addressed RFP §VI. A. 7. with three appendices containing 60 pages (PDF pg. 380-440) of disclosures that are redacted from public disclosure. In its protest, Healthy Blue asserted that there are four investigations that United should have disclosed and that--as a result of alleged non-disclosure--United should be disqualified from the RFP process.

In evaluating the RFP proposals, DHHS accepted United's disclosures as satisfying §VI. A. 7.'s pass/fail requirements and did not disqualify the proposal. The evaluators were entitled to rely upon the bidders' representations and were not obligated to seek out information that might conflict with or contradict any of the respective bidders' §VI. A. 7 representations. Even now, with Healthy Blue's protest, insufficient information has been presented to require or justify a different evaluation of United's disclosures.

Confining its review of United's proposal to the documents submitted—as it did with the evaluation of all bidders' proposals—was a proper exercise of discretion by DHHS. It was not arbitrary, the result of favoritism, an exercise of ill will, fraudulent, or the result of collusion. Indeed, testing or investigating this (or any other) representation of the bidders would vastly and impractically expand the scope of the evaluation process, making the choice of successful bidders nearly impossible. Venturing outside the RFP process to explore competitors' many criticisms of each other would not be productive. Healthy Blue's proposal that United be disqualified on the grounds stated in its protest is an unworkable response that would only add unnecessary expense and delay to the process of selecting responsible Medicaid MCOs.

V. CENTENE'S DISCLOSURES OF SETTLEMENTS

As stated above, §VI. A. 7. of the RFP (RFP pg. 174) requires bidders to disclose contract performance and criminal or regulatory investigations or sanctions. Healthy Blue challenged Centene's disclosures of criminal or civil investigations by a state or federal agency as being inadequate, principally by questioning whether "no-fault settlements" must be considered "investigations" for purposes of this RFP. Centene identified 20 criminal and civil investigations in Attachment A. 7. A. (pages 273 through 274) of its proposal. Additionally, in Attachment A. 7. B. of its proposal (pages 276 through 341), it disclosed scores of regulatory actions or sanctions (eight of which are against Nebraska Total Care and the balance of which are against Centene affiliates).

Based on its own independent research of Centene, Healthy Blue protested that there were other settlement payments totaling \$488,900,000 made by Centene arising from its pharmaceutical benefits management program which were not disclosed in Centene's proposal. Several of these settlements appear to have been achieved or announced only after the July 1, 2022 date for submission of RFP proposals. In its oral presentation, Healthy Blue identified a \$29,343,907.91 settlement by Nebraska Total Care with the state of Nebraska which was publicly announced on October 22, 2022. It also asserted that a post-proposal Centene settlement with the state of Texas should be considered by DHHS.

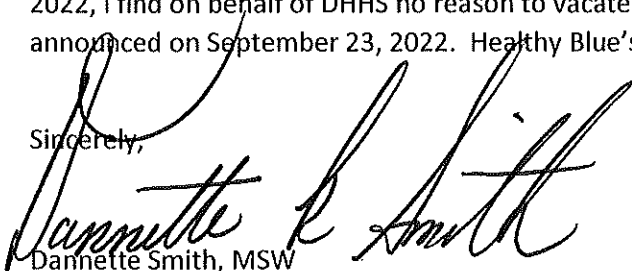
DHHS RFP evaluators exercised their discretion when considering all bidders' disclosures, and did so in a uniform manner. All bidders' disclosures were given appropriate weight; none of the proposals were disqualified; and the award of contracts took into account the evaluators' exercise of discretion. Healthy Blue presented the Centene settlements as new information about **investigations** which DHHS should consider to Centene's detriment. However, Centene has explained—in the protest process to date—that the payments were no-fault settlements with government entities, made to avoid investigation and litigation. The proposal was responsive to Section VI. A. 7. of the RFP. The evaluators exercised appropriate discretion and no new information has been provided by Healthy Blue which requires DHHS to alter its evaluation of Centene's proposal.

In summary, when evaluating Centene's PBM settlements, DHHS considered their timing, no-fault character, and anticipatory nature. Doing so was a proper exercise of discretion which was neither arbitrary nor capricious, prejudicial to any other bidders, or the result of favoritism.

VI. CONCLUSION

After considering all relevant information, and particularly after considering the written material submitted to me on November 7, 2022 and December 9, 2022, and the oral presentation to me on December 6, 2022, I find on behalf of DHHS no reason to vacate or modify the award of contracts under RFP 112209 O3 announced on September 23, 2022. Healthy Blue's protest of December 6, 2022 is hereby denied.

Sincerely,

A handwritten signature in black ink, appearing to read "Darnette R. Smith". The signature is written in a cursive style with a large initial "D" and "S".

Darnette Smith, MSW
Chief Executive Officer
Department of Health and Human Services