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January 29, 2024

SENT VIA EMAIL

Ms. Meggan LaPorte
Arizona Health Care Cost Containment System (AHCCCS)
801 E. Jefferson St.
Phoenix, AZ 85034
Sent via email to:

Meggan.LaPorte@azahcccs.gov
RFPYH24-0001@azahcccs.gov

Re: Banner's Reply to Arizona Physician's IPA's ("United") Response to Banner's Protest of Contract Award ALTCS E/PD RFP YH24-0001

Dear Ms. LaPorte:

Banner submits this reply to United's January 12, 2024 response opposing Banner's bid protest. Banner was not able to address United's response in our January 16 letter because United filed its response *ex parte*, and the response only became known to Banner ten days later when it was posted by AHCCCS. Mindful of the comments in your January 12, 2024 notice, this response addresses only the new arguments asserted by United, without re-addressing issues previously raised by Centene in its January 8 letter.¹ Banner reserves the right to raise additional issues as they may arise and as additional documents are produced.

As Banner's protest demonstrated, the AHCCCS procurement was not reasonably designed or implemented to achieve its purpose, and it was impaired by material flaws. As a result, the contract award was arbitrary, capricious, and contrary to law and must be set aside.

REPLY

United fails to meaningfully defend the procurement and instead asks the Procurement Officer to adopt limitations on the agency's authority that would undermine the right to protest and to obtain a stay. United cites the Arizona Procurement Code, but the Code affirms Banner's grounds for protest and its entitlement to relief. United cites authority addressing circumstances

¹ United largely repeats the arguments in Centene's response, to which Banner already replied. *See* Banner Jan. 16, 2024 [reply](#); *see also* [MercyCare](#) and [Health Choice](#) replies. For efficiency, Banner references and incorporates its reply to Centene rather than restate it here.

in which errors were harmless because they affected all applicants equally. Here, the errors identified by Banner prejudiced Banner and resulted in it being excluded from an award despite Banner's proven track record of success in coordinating care for Arizona Medicaid beneficiaries, including earning the highest operational review score from AHCCCS among ALTCS plans in 2023. Finally, the RFP required individual scoring by individual evaluators, but AHCCCS has not produced documents reflecting such scoring from the heavily weighted and highly subjective oral presentations.

The Procurement Officer has the authority to issue a stay of the contract award, which is a necessary remedy.

United asserts that the Procurement Officer lacks authority to issue a stay. But the administrative code states precisely the opposite: “[i]f a protester files a protest before the contract award, the procurement officer may issue a written stay of the contract award.”² The contract “award” is tied, in regulation, to the expenditure of public monies.³ If the protest is filed before the expenditure of public monies, the Procurement Officer may, in her discretion, stay the execution of that contract. This plain reading of the regulations affords the Procurement Officer this practical and necessary authority.

United's position not only contradicts the code, if adopted it would sow disarray. It would force the Procurement Officer to proceed with a contract, challenged as flawed, forcing disruption in care for members and providers, and disrupting the relationships between members and their Banner Case Managers. Then, if the protest succeeds, massive disruption would repeat itself. A stay is appropriate here because it is reasonably probable that Banner's protest will succeed, and the stay is in the best interest of the State.⁴

United's own authorities support Banner's protest.

Banner protest shows that the procurement was unlawful because AHCCCS finalized its scoring methodology *after* bids were submitted and ultimately chose a methodology inconsistent with the RFP. In response, United—like Centene—argues, wishfully, that AHCCCS's executive summary of the procurement, which revealed for the first time that the scoring methodology was in development after bid submission, means something other than what it says.⁵

Critically, United does not (because it cannot) argue that the procurement complied with the law if the executive summary means what it says -- that AHCCCS developed the scoring methodology after bid submission. In fact, United essentially concedes the procurement would be unlawful, citing to the Arizona Procurement Code and the Arizona State Procurement Manual,⁶ which require the RFP to “state the relative importance of price and other evaluation

² A.A.C. R9-22-604(E).

³ A.A.C. R9-22-601(B).

⁴ A.A.C. R9-22-604(E)(1), (2).

⁵ United Resp. at 3-5.

⁶ United Resp. at 6.

factors,”⁷ and ensure that “the order of importance of the criteria cannot be changed from what was stated in the RFP.”⁸ The manual cites to Arizona procurement regulations, which in turn require that “[t]he agency chief procurement officer *shall not modify* evaluation criteria or their relative order of importance after offer due date and time.”⁹ AHCCCS’s own procurement regulations echo this by mandating that the agency “shall evaluate a proposal based on the GSA and the evaluation factors *listed in the RFP.*”¹⁰ These authorities, all uncontested by United, establish that the procurement was unlawful if AHCCCS changed the evaluation criteria or the order of importance of those criteria after the bids were submitted. And, as AHCCCS made clear in its summary of the process, that’s exactly what happened.¹¹

The prohibition on modifying the relative order of importance of evaluation criteria further illustrates the problem with AHCCCS’s decision to weigh oral presentations so heavily. United contends that, despite the RFP’s failure to explain whether and how the oral presentations would be scored, Banner and the other offerors should have somehow read AHCCCS’s mind.¹² But silence is not disclosure. Even if one could infer through silence some kind of scoring, the agency’s scoring would still run afoul of the prohibition on modifying the relative order of importance of criteria, because nothing in the RFP gave *any hint whatsoever* that oral presentations would be by far the *most important* factor. Instead, the RFP omits oral presentations from its “factors,” and the discussion of oral presentations fails to provide notice that they will be scored at all.¹³

United misapplies the “equally impacted” standard, but even under that standard the protest must be sustained.

United repeatedly claims that the protest should be denied because, it says, any errors by AHCCCS affected all bidders equally.¹⁴ But that contention is unsupported by the record and the authority United cites.

United relies on *Connected Glob. Sols., LLC v. United States*,¹⁵ a case involving different facts, process, and law than the matter at hand. There, plaintiffs challenged how an agency *reevaluated* bid proposals, based on the Government Accountability Office’s recommendation to do so, during a corrective action following a successful bid protest.¹⁶ The court determined the agency’s approach, where it reduced the number of strengths evaluated in its re-issued RFP

⁷ A.R.S. § 41-2534(E).

⁸ Ariz. Proc. Manual §§6.2.11 and 6.8.3 available here, at pages 39 and 45, <https://spo.az.gov/sites/default/files/Arizona%20State%20Procurement%20Manual%20DC%20009%20r0.pdf> (last visited Jan. 27, 2024).

⁹ A.A.C. R2-7-C316 (*emphasis added*).

¹⁰ A.A.C. R9-22-602(B)(2) (*emphasis added*).

¹¹ Compare RFP § H (8) to AHCCCS000400 (Executive Team Meeting, Nov. 8, 2022).

¹² United Resp. at 7.

¹³ RFP § H (8) and (B12).

¹⁴ United Resp. at 8-10.

¹⁵ No. 22-292C, 2022 WL 16954007 (Fed. Cl. Oct. 28, 2022).

¹⁶ *See id.* at 4.

compared to its original RFP, “affected each offeror” because each “lost similar numbers of strengths.”¹⁷ The issue of unequal treatment is a question of prejudice.¹⁸ Here, in contrast, the agency’s scoring methodology had disparate effects on the various bidders.

There is no question that the agency’s decisions to score oral presentations and weigh them so heavily affected bidders differently. High oral presentation score recipients like United and Centene were meaningfully advantaged, and Banner was dramatically prejudiced because its past performance and written responses, which more accurately project future performance, were significantly devalued.

The undisclosed forced-ranking system also affected bidders disparately. By significantly reducing the possibility of negligible differences in scoring among the plans, forced ranking erased the RFP’s considerations including potential disruption to members, a bidder’s history with Medicare, or prior compliance actions and judgments against a bidder.¹⁹ This favored organizations like Centene and United, whose checkered history would have weighed against them, and disfavored incumbents like Banner, whose retention would have resulted in less member disruption.

The Procurement File remains incomplete.

United claims that the forced ranking and consensus scoring worked because “each team member will first individually evaluate the Offeror’s response.”²⁰ But AHCCCS has not produced documentation confirming this process for oral evaluations, the most subjectively scored aspect of the procurement. And in the very case United cites, *United Global Sols., LLC v. United States*, the bid protest was sustained, in part, because the agency “failed to adequately document oral presentations.”²¹ To that point, Banner advises the Procurement Officer that records requests remain outstanding and new grounds for protest may come to light. Among other things, despite repeated requests, AHCCCS has provided scant records from Pacific Health Policy Group, the consultant engaged to assist with the procurement. Banner continues to reserve the right to supplement its protest as additional materials are received.

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¹⁷ *Id.* at 9-10.

¹⁸ *Id.* at 9.

¹⁹ See RFP Section H(8).

²⁰ United Resp. at 12.

²¹ 2022 WL 16954007 at 4.

Reply to United's Response to Protest Bid

January 29, 2024

Page 5

REQUEST FOR RELIEF

Banner requests that AHCCCS sustain this protest, stay the award as detailed in A.A.C. R9-22-604(E), extend the existing contract nos. YH18-0001 for another 12 months, and issue a revised solicitation to remedy these errors.

Very truly yours,

A handwritten signature in black ink, appearing to read "David B. Rosenbaum", with a long horizontal flourish extending to the right.

David B. Rosenbaum