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**SENT VIA EMAIL**

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Sent via email to:

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Re: Reply to Centene's Response to Banner's Protest of Contract Award  
ALTCS E/PD RFP YH24-0001

Dear Ms. LaPorte:

Banner submits this response to the January 8, 2024, letter submitted by Health Net Access, Inc. ("Centene") opposing Banner's bid protest. Mindful of the comments in your January 12, 2024, notice, this response addresses only the arguments asserted by Centene in its January 8 letter, while reserving 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 should be set aside.

**SUMMARY OF REPLY**

Centene's response largely eschews defending the procurement to focus instead on arguing that Banner's protest should be rejected even if the procurement was flawed. Centene's arguments against Banner's protest lack support in the record or established legal principles.

First, Banner's protest was timely and its arguments ripe. Banner waived none of its arguments because none turned on a patent impropriety that could have been addressed earlier. Rather, the errors asserted were not discoverable until after the award was issued.

Second, Centene attempts to improperly limit the Procurement Officer's authority to resolve this protest by applying the standard for appeal to the Director. However, even if that standard applied, Banner meets it because it suffered actual prejudice from the errors of the RFP process and has standing to protest because (1) the errors identified require that the procurement be canceled and re-bid; and (2) the scoring errors, if corrected, would have resulted in an award to Banner.

Third, Centene's record of sanctions is, in fact, pertinent to the award decision and its flaws. Indeed, new information regarding sanctions against Centene not available before the protest deadline raises further concerns that should be considered in this process.

Fourth, the cost evaluation did not provide a reasonable, objective basis for review because AHCCCS provided guidance that was susceptible to unintended varying interpretations and because it does not appear as though AHCCCS made any determination as to the reasonableness of the costs bid but rather simply accepted the lowest-cost bid.

Finally, Banner notes that AHCCCS's production of the procurement file remains incomplete, and Banner continues to reserve the right to supplement its protest as additional materials are obtained.

**I. Banner's protest is timely.**

Centene incorrectly asserts that Banner waived its protest of the evaluation process for not raising the problems with the scoring methodology earlier.<sup>1</sup> Centene overlooks the obvious: Banner could not complain about the final scoring methodology earlier because it wasn't disclosed in the RFP, and Banner had no way of knowing that AHCCCS would deviate so drastically from past practice. Indeed, AHCCCS did not disclose the problematic portions of the scoring process until *after* it announced the award and apparently continued to change its scoring methodology long after offerors submitted their bids.

AHCCCS regulations and caselaw required "protests related to errors apparent on the face of the bid to be filed" on or before September 18, 2023. *Arizona's Towing Prof'ls, Inc. v. State*, 196 Ariz. 73, 76 (App. 1999); A.A.C. R9-28-604 (protests to ALTCS contracts follow the procedures set forth in A.A.C. R9-22-604, which provides in pertinent part that "[a] protestor filing a protest alleging improprieties in an RFP or an amendment to an RFP shall file the protest at least 14 days before the due date of receipt of proposals").

Here, the errors Banner identifies in its protest were not apparent on the face of the bid. Just the opposite, in fact, all indications were that the oral presentations would not be scored and that forced-rank scoring would not be used. The RFP told offerors that the agency "has established a scoring methodology,"<sup>2</sup> and nothing in the RFP indicated that such methodology included scoring oral presentations or forced ranking. Banner could not possibly have known, based on that information, that AHCCCS would score orals at all, let alone weigh them so heavily. Indeed, two offerors sought clarification of the scoring and weighting process AHCCCS advised had been established.<sup>3</sup> But AHCCCS refused, four times, repeatedly responding: "AHCCCS will not be

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<sup>1</sup> Centene Resp. at 2, 3, 10.

<sup>2</sup> RFP § H (8).

<sup>3</sup> Questions and responses numbered 23, 24, 25, and 35 of Solicitation Amendment #1 available at: [https://www.azahcccs.gov/Resources/Downloads/Solicitations/Open/RFPs/YH24-0001\\_ALTCS/EPD\\_ALTCS\\_EPDPDF/YH24-0001-Amendment1.pdf](https://www.azahcccs.gov/Resources/Downloads/Solicitations/Open/RFPs/YH24-0001_ALTCS/EPD_ALTCS_EPDPDF/YH24-0001-Amendment1.pdf) (last visited January 14, 2024).

providing scoring or weighting details.”<sup>4</sup> True to its word, AHCCCS provided no further clarification, and it gave no reason to question that, in fact, a scoring and weighting process had already been established as reflected in the RFP.<sup>5</sup> Records now available, post-award, demonstrate that AHCCCS apparently provided no guidance to offerors on scoring because, contrary to the representation in the RFP, AHCCCS had not finalized a process for scoring.

Thus, Banner's protest rests not merely on substantive flaws in the scoring process that were not “apparent on the face” of the RFP, but also on the RFP's failure to disclose the process. Without clarification, Banner reasonably believed what the RFP said: oral presentations were not a factor to be scored.<sup>6</sup> Banner's experience with previous AHCCCS procurements supported this belief because prior RFPS explicitly advised offerors, prior to submission of offers, that oral presentations would be weighed and scored.<sup>7</sup>

This RFP also failed to disclose that it would use a forced-ranking scoring system, so Banner could also not have protested that anomaly earlier. And again, all indications were to the contrary: the RFP expressly discussed how the agency would deal with negligible differences in scores, an impossibility under forced ranking.<sup>8</sup> Thus, whether or not forced-rank scoring had been used in past procurements, this RFP failed to disclose that it would be used this time. It implied the opposite and, more to the point, gave no grounds to raise the issue prior to award. Simply put, one cannot challenge what one was not told.

Perhaps recognizing that Banner in no way waived challenges to the scoring methodology, Centene pivots to attempting to defend that process. But Centene's response largely ignores the actual language of the RFP in favor of Centene's own spin on it, at times directly at odds with AHCCCS's words. For example, to defend AHCCCS's decision to develop the scoring methodology *after* receiving offers (despite telling the world in the RFP that the methodology had already been developed), Centene argues that AHCCCS's plain language means something other than it says. In its Executive Summary, AHCCCS was clear that “[t]he Scope Team met October 2, 2023, through November 15, 2023 *to develop the scoring methodology*[.]”<sup>9</sup> Centene tries to wave away the patently problematic implications of this statement by calling it “simply confusion over wording” and speculating that AHCCCS “likely...meant” something other than what it said.<sup>10</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> A.A.C. R9-22-602(A)(4), not requiring scoring or weighting details for “factors used to evaluate a proposal.”

<sup>6</sup> RFP § H (8) “Factors” omit oral presentations; instructions limit evaluation to audio tapes and do not notice scoring of oral presentations, RFP § H (B12).

<sup>7</sup> YH14-0001, YH18-001, and YH19-0001 Instructions to Offerors describe scored components and include “oral presentations.”

<sup>8</sup> RFP § H (8).

<sup>9</sup> Request For Proposal (RFP) Executive Summary YH24-0001 – ALTCS E/PD (December 1, 2023) at 2 (*emphasis added*).

<sup>10</sup> Centene Resp. at 12.

In a similarly futile attempt to defend AHCCCS's decision to score the orals without notice, Centene tries in vain to muster an argument that the offerors should have known orals would be scored. But Centene is forced to rely on sleight of hand. Unable to find anything in the RFP saying that AHCCCS would score oral presentation—because nothing exists—Centene instead argues that the RFP didn't say oral presentations “would *not* be scored”<sup>11</sup>—as if not telling bidders that an element *won't* be scored is somehow sufficient to put them on notice that it will be scored. Of course, Centene cites no authority for that remarkable proposition, one that would defy first principles of government contracting law, that agencies must disclose, ahead of time, how bids will be scored. Finally, Centene acknowledges that AHCCCS gave orals more weight than in past procurements but nonetheless argues that was within the agency's discretion.<sup>12</sup> But that argument misses the point: the problem is that AHCCCS scored orals and gave them much more weight than prior procurements *without telling offerors*. Whether AHCCCS had the discretion to weigh orals more or less is irrelevant: the agency did not have the discretion to hide that information from bidders until after the award was announced.

## **II. Banner suffered actual prejudice from the errors of the RFP process and has standing to protest.**

Centene's other threshold argument—that Banner lacks standing—similarly lacks merit. Centene misstates the applicable burden, ignoring the very law it cites, and misunderstands the facts.

Centene's argument that Banner cannot show prejudice is both factually and legally infirm. As a legal matter, Centene is wrong that Banner has standing only if it can show “it would have received a contract,”<sup>13</sup> for two reasons. First, Centene misstates the burden for protest: the standard of review for an appeal to the Director does *not* apply. Rather, at this earliest stage of protest, the Procurement Officer has broad authority to resolve the protest. “The procurement officer issuing a RFP shall have the authority to resolve proposal protests ... the procurement officer shall consider all of the circumstances of the procurement.”<sup>14</sup> This is especially true where, as here, the scores used were not binding.<sup>15</sup>

Second, Centene's argument that Banner has standing only if it can show for certain that it would have received an award ignores the very standard Centene cites. Centene claims that to have standing a protestor must show “a substantial chance” of winning the contract but for the errors identified in the protest.<sup>16</sup> But of course, a “substantial chance” of a contract award is not the same as showing that an award is a certainty in the counterfactual. And as a matter of law,

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<sup>11</sup> Centene Resp. at 19.

<sup>12</sup> Centene Resp. at 20.

<sup>13</sup> Centene Resp. at 10.

<sup>14</sup> A.A.C. § 9-22-604(B) and (H).

<sup>15</sup> RFP § H at 5.

<sup>16</sup> Centene Resp. at 10, n.10 (citing *Labatt Food Serv., Inc. v. United States*, 577 F.3d 1735, 1378 (Fed. Cir. 2009)).

Banner “has “a ‘substantial chance’ of receiving a contract—and therefore standing to challenge the award” because it seeks to have the procurement canceled and the contract rebid to “compete for the contract during the reopened bid.” *Tinton Falls Lodging Realty, LLC v. United States*, 800 F.3d 1353, 1359 (Fed. Cir. 2015) (citing *Impresa Costruzioni Geom. Domenico Garufi v. United States*, we held that. 238 F.3d 1324, 1334 (Fed.Cir. 2001). Moreover, even if Banner needed to show that a re-scoring would have resulted in it receiving an award, Banner did so. In its protest, Banner reweighed the scores to match the process detailed by the RFP. And when it does so, Banner finishes in the top two scorers and Centene falls off.<sup>17</sup> Banner plainly has an economic interest in the outcome of its protest.

### **III. New information demonstrates that Centene is not a responsible awardee.**

Centene seeks the benefit but not the burden of its huge corporate family by arguing in favor of a competitive size advantage – relying on its national conglomerate of affiliates – while failing to disclose to AHCCCS its checkered compliance history.<sup>18</sup> Centene brags about how it “benefits from the resources and backing of its ultimate parent company, Centene Corporation,” the “largest Medicaid managed care organization in the United States.” Indeed, Centene Corporation is enormous—and enormously profitable, earning *billions* in profits on revenues of well more than \$100 *billion* last year, numbers that Centene expects to increase in 2024.<sup>19</sup> Yet while claiming to “benefit from” its parent company’s massive size and plentiful resources, Centene simultaneously seeks to brush aside the parent’s history of misconduct in government, including the hundreds of millions of dollars Centene has paid states to settle claims regarding overcharging state Medicaid agencies, as “no-fault” settlements—as though a sophisticated entity like Centene would willfully hand over hundreds of millions of dollars to settle claims that had no merit.

Banner detailed some of the Centene family’s misdeeds in its initial submission.<sup>20</sup> Since the protest deadline passed, more have come to light. In particular, CMS recently sent a Notice of Termination, CMS’s most serious progressive compliance action, and Intermediate Sanction to Centene’s Medicare Advantage Organization (MAO), Wellcare Health Insurance of Arizona, Inc. (H5199), due to substantially failing to achieve a Part C summary Star Rating of at least three stars in three consecutive Star Rating periods.<sup>21</sup> The immediate sanction consists of suspension of enrollment of Medicare beneficiaries into WellCare’s H5199 contract. Moreover, all three MAOs cited by Centene in Section B2 of its response were recently subjected to civil monetary penalties by CMS for material program noncompliance, including overcharging enrollees, also a serious

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<sup>17</sup> Banner Protest at 16.

<sup>18</sup> Centene Resp. at 3.

<sup>19</sup> <https://www.reuters.com/business/healthcare-pharmaceuticals/health-insurer-centene-raises-2024-profit-forecast-2023-12-12/>

<sup>20</sup> Banner Protest at 17-19.

<sup>21</sup> CMS Imposition of Penalty Letter dated December 27, 2003, available [here](https://www.cms.gov/files/document/wellcare-az-termination-sanction-notice-12272023.pdf) (last visited January 16, 2024). <https://www.cms.gov/files/document/wellcare-az-termination-sanction-notice-12272023.pdf>

compliance action.<sup>22</sup> Moreover, the local MAO Bridgeway Health Solutions of Arizona contract (H5590), dropped from 3.5 to 3 Stars for Contract Year 2024, whereas Banner increased from 3 to 3.5 Stars.<sup>23</sup> This new information confirms the important concerns raised in Banner's protest.

**IV. Records produced make it apparent that offerors did not consistently apply or understand AHCCS's directions on cost proposals.**

There were no clear metrics provided for cost proposals, as is apparent from the award to United despite its "unsustainable" bid.<sup>24</sup> The myopic focus on lowest bid, rather than a realistic and cost-effective bid, was not apparent until records were released and was therefore not waived as untimely. Banner was penalized for providing the administrative costs necessary to run a successful program with an emphasis on compliance. More explicit instructions from AHCCS on how costs would be evaluated would have resulted in modifications from all bidders.

**V. The Procurement File remains incomplete.**

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, AHCCS has provided scant records from Pacific Health Policy Group, the consultant engaged to assist with the protest. Banner continues to reserve the right to supplement its protest as additional materials are received.

**REQUEST FOR RELIEF**

Banner requests that AHCCS 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,



David B. Rosenbaum

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<sup>22</sup> CMS Imposition of Penalty Letter dated November 2, 2023, available [here](https://www.cms.gov/files/document/centenecmp11022023.pdf) (last visited January 16, 2024).

<sup>23</sup> Although offerors could have submitted 2024 Star ratings, AHCCS amended the solicitation from requiring the "most recent" Star rating to require the "2023 AZ Medicaid Plan D-SNP STAR Rating." Banner's ranking improved while others' rankings decreased. RFP, Solicitation Amendment #2, p. 2.

<sup>24</sup> AHCCS001504 at line 22: "very low PMPM that is unsustainable."