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June 15, 2011

**VIA ELECTRONIC AND HAND DELIVERY**

Tom Betlach  
Director  
Arizona Health Care Cost Containment System  
701 E. Jefferson, MD 5700  
Phoenix, AZ 85034

Re: Appeal of Procurement Officer's June 10, 2011, Decision/RFP NO.: YH12-0001/SCAN Long Term Care Bid Award Protest

Dear Mr. Betlach:

This law firm represents SCAN Long Term Care ("SCAN"). Arizona Health Care Cost Containment System ("AHCCCS") did not award the Arizona Long Term Care System (ALTCS) Elderly & Physically Disabled ("E/PD") contract to SCAN. SCAN filed a bid protest on May 31, 2011,<sup>1</sup> which was denied by Michael Veit, the procurement officer, on June 10, 2011, (the "Decision"). The basis of the denial of SCAN's bid protest was timeliness. SCAN hereby appeals that Decision.

As required by the Arizona Administrative Code ("A.A.C.") Rule R9-22-604.C.2. and I., SCAN provides the following information:

<b>Protester/Appellant:</b>	SCAN Long Term Care 1313 E. Osborn Road, Suite 150 Phoenix, AZ 85014
<b>Bid Solicitation Number:</b>	YH12-0001
<b>Detailed Statement:</b>	Bid Protests of May 31, 2011, attached
<b>Relief Requested:</b>	Award of an ALTCS contract for Maricopa County

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<sup>1</sup> A second bid protest was filed by SCAN on June 3, 2011, based on the scoring of oral presentations. No decision has yet been issued on that bid protest.

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**Procurement Officer's Decision:** Decision dated June 10, 2011, attached

Additional information required under A.A.C. Rule R9-22-604.I., including a detailed statement of the legal and factual basis for the appeal, are provided in the remaining portions of this letter. This appeal is based on the procurement officer's interpretation of the ten (10) day requirement for filing a bid protest contained under A.A.C. Rule R9-22-604.I. SCAN requests that the Decision be reversed, that its bid protest be determined to have been timely filed, that a decision on its bid protest be issued and that it be awarded an uncapped ALTCS EPD contract.

**SCAN'S BID PROTEST WAS TIMELY FILED**

**"[A] protester shall file a protest within 10 days after the protester knows or should have known the basis of the protest."**

The procurement officer concluded that "[u]sing the date most favorable to SCAN for calculating timeliness of the protest, SCAN knew or should have known the basis for its protest no later than May 17. S[CAN] was thus required to file the protest no later than May 27, 2011." *Decision*. The procurement officer's Decision is based on the date when Scoring Binders and the other Offerors' written RFP proposals were produced to SCAN on May 17, 2011.

A.A.C. Rule R9-22-604.D.3. specifically states that a bid protest must be filed within 10 days after the protester **knows or should have known the basis of its protest**. Based on the attached Declaration of Tina Graham, the Compliance Officer for SCAN, there is no question that SCAN did not know the basis of its bid protest on May 17, 2011, when SCAN received documents produced by AHCCCS.<sup>2</sup>

SCAN received the relevant documents from AHCCCS after declining to participate in a debriefing in which AHCCCS offered to make documents available for review, at which time notes could be taken and documents tagged for later copying. Jamie Snyder, AHCCCS' Interim ALTCS Administrator, offered to be available for questioning during the morning of May 17, 2011. Because of the volume of material expected to be made available and the number of SCAN personnel who would be necessary for a review and analysis, the offer was declined and production of relevant documents was requested.

The documents needed to determine if scoring errors were made, which affected the outcome of SCAN's written RFP Response, were produced by AHCCCS on May 17, 2011, and

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<sup>2</sup> See *Mayer v. Good Samaritan Hospital*, 14 Ariz.App. 248, 252, 482 P.2d 497, 501 (1971) ("To say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic.") (internal citations omitted).

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immediately distributed to appropriate employees of SCAN for review. The documents totaled over 1000 pages consisting of two scoring binders (one for Capitation & Organization and the other for Network and Programs), and the written RFP Responses of Evercare, MercyCare and Bridgeway, each of which consisted of several hundred pages.

SCAN did not have reason to know the facts underlying its bid protest until after it reviewed over 1000 pages of material produced by AHCCCS. The earliest possible date it could have known that scoring errors were committed was May 18, 2011, the day after it received the documents requested from AHCCCS.<sup>3</sup> See *Declaration of Tina Graham*, attached.

The filing of SCAN's bid protest on May 31, 2011, was within the 10 day period required under AHCCCS' rules and regulations and was timely. By adopting the language of A.A.C. Rule R9-22-604.D.3., AHCCCS deliberately permitted leniency in calculating time periods for filing bid protests. AHCCCS could have, but did not, adopt stricter language requiring the filing of a bid protest within 10 days following a bid award or within 10 days of bid and award material being made available. Neither did AHCCCS define what constitutes knowledge of the basis of a bid protest, define the computation of time for purposes of filing a bid protest nor indicate the running of time during intervening weekends, legal holidays or dates falling on those days.<sup>4</sup> Instead, AHCCCS adopted a rule making the running of time for filing bid protests indeterminate, indefinable and inexact. AHCCCS should not be permitted to use its rules to unfairly circumvent legitimate protests concerning the award of ALTCS-EPD contracts which directly affect a vulnerable population.

It was not possible for SCAN to know whether it had a basis for protest the same day it received the documents to be reviewed, compared and analyzed. Even if SCAN had fully examined and concluded the basis of its bid protest by May 18, 2011, which it had not, the filing of its bid protest was timely since the tenth day following May 18, 2011, fell on the Saturday weekend of Memorial Day, a legal state holiday. *A.R.S. § 1-301.A*. SCAN's bid protest could not be filed with AHCCCS until May 31, 2011, the day following Memorial Day. SCAN's bid protest, therefore, was timely.

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<sup>3</sup> "Under the discovery rule, . . . a cause of action does not accrue until the plaintiff knows or with reasonable diligence should know the facts underlying the cause [of action]." *Doe v. Roe*, 191 Ariz. 313, ¶ 29, 955 P.2d 951, 960 (App.1998). "A plaintiff must at least possess a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury." *Id.*, 191 Ariz. 313, ¶ 32, 955 P.2d at 961; see also, *Lawhon v. L.B.J. Institutional Supply, Inc.*, 159 Ariz. 179, 183, 765 P.2d 1003, 1007 (App.1988) (cause of action accrues when plaintiff discovers injury is attributable to particular person's conduct; plaintiff must know both the what and who elements). Thus, "[t]he relevant inquiry is when did a plaintiff's 'knowledge, understanding, and acceptance in the aggregate provide [ ] sufficient facts to constitute a cause of action.'" *Little v. State*, 225 Ariz. 466, 240 P.3d 861, 864 (App. 2010) (quoting *Walk v. Ring*, 202 Ariz. 310, 44 P.3d 990, 996 (2002)).

<sup>4</sup> AHCCCS defined the word "day" in A.A.C. Rule R9-22-101.B. as a calendar day. It has defined computation of time in calendar days and working days and has adopted rules for days falling on weekends or legal holidays in other contexts not relevant to the instant proceeding. See A.A.C. Rule R9-34-203 regarding requests for eligibility hearings and A.A.C. Rule R9-34-303, regarding appeals for fee-for-service members.

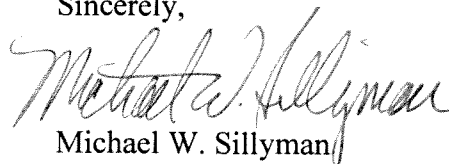
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Arizona recognizes Memorial Day as an official state holiday on which public offices are closed. *A.R.S. § § 1-301 and 302*. In addition, state law proclaims that when anything of a secular nature is to be done within a time named and the last day falls on a holiday, "it may be performed on the next ensuing business day with effect as though performed on the appointed day." *Id. at § 1-303*. Although Saturday is not identified as a state holiday under *A.R.S. § 1-301*, the five-day week for state offices was not in effect when the state holiday statute was enacted. Subsequently, *A.R.S. § 38-401* established office hours for state offices "for transaction of business from eight o'clock a.m. until five o'clock p.m. each day from Monday through Friday." The Arizona Attorney General has opined that Saturday is considered a State holiday for purposes of dates on which acts or filings are required to be done.<sup>5</sup>

Assuming that SCAN recognized the bases for a bid protest for scoring errors on May 18, 2011, the tenth day thereafter was Saturday, May 28, 2011. With Monday, May 30, 2011, as a legal holiday, SCAN's bid protest was not due under Arizona law and A.A.C. Rule R9-22-604.D. until Tuesday, May 31, 2011. It is respectfully requested that the procurement officer's Decision be reversed, that SCAN's bid protest be determined to have been timely filed and that the procurement officer issue a Decision based on SCAN's bid protest filed on May 31, 2011.

SCAN requests that the Director's decision be based solely upon the contract record and this appeal.

Sincerely,



Michael W. Sillyman

cc: Michael Veit, Procurement Officer

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<sup>5</sup> See *Op. Atty. Gen. No. 58-107* ("[I]t was the intent of the legislature that, insofar as State offices are concerned, Saturday should be considered a State holiday . . . and that all payments due on a Saturday may be made on the following business day with effect as though performed on the appointed day."); and *Moody v. Vans Gila Gin Co.* 89 Ariz. 280, 361 P.2d 541 (1961) (When day for filing protest of award fell on day state office was closed, application for rehearing filed on Monday was timely.) See also *A.R.S. § 1-243.A.* ("[T]he time in which an act is required to be done shall be computed by excluding the first day and including the last day, unless the last day is a holiday, and then it is also excluded.")



5. Upon receipt of the written bid submissions and scoring tools, the documents were immediately distributed for review and comparison of responses and scoring to various individuals at SCAN including:

Maureen McGurrin, VP Operations

Mehrdad Shafa, MD, Medical Director

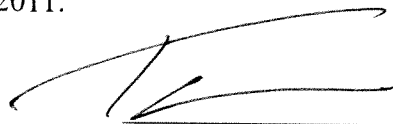
Joey Zepeda, VP Case Management

Tina Graham, VP, Compliance

Lisa N. Davis, VP, Associate General Counsel

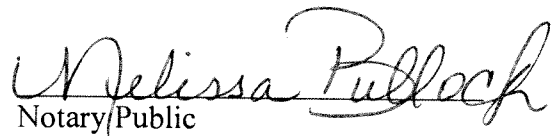
6. The comparison of written responses of the three awardees to the written responses of SCAN and the analysis and review of points awarded to each of the four responders for the various categories of responses took several days to complete. SCAN was not aware of the basis of its bid protest, or even if it had a basis, until a date after May 17, 2011, and not before May 18, 2011.

DATED this 15 day of June, 2011.



Tina Graham  
Compliance Officer  
SCAN Long Term Care

SUBSCRIBED AND SWORN TO BEFORE ME this 15<sup>th</sup> day of June, 2011,  
by Tina Graham.



Notary Public

My Commission expires:

March 16, 2012

