



**Office of Chief Counsel**

P.O. Box 1437, Slot S260, Little Rock, AR 72203-1437  
P: 501.396.6168 F: 501.682.8009 TDD: 501.682.8933

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*VIA EMAIL*

Mr. Edward Armstrong, Director  
Office of State Procurement  
Arkansas Department of Transformation and Shared Services  
1509 West 7<sup>th</sup> Street, Suite 300  
Little Rock, AR 72201

RE: Protest by Delta Dental Plan of Arkansas, Inc.  
RFP No. 710-23-0081 – Dental Managed Care

Dear Director Armstrong,

The Arkansas Department of Human Services (“DHS”) posted an Anticipation to Award (“ATA”) on its website on December 8, 2023, regarding Request for Proposal (“RFP”) No. 710-23-0081 for the Arkansas Medicaid Dental Managed Care Services contract. The bidders named in the ATA are Delta Dental Plan of Arkansas, Inc., Liberty Dental Plan of Arkansas, Inc., DentaQuest National Insurance Company, Inc., and MCNA Insurance Company.

On December 22, 2023, Delta Dental Plan of Arkansas, Inc. (“Delta Dental”) submitted a Protest of Award (“Protest”) to DHS Agency Secretary Kristi Putnam via e-mail and hand-delivery. Delta Dental also provided a courtesy copy of the Protest via e-mail to the listed e-mail contacts of the other three bidders. DHS Chief Procurement Officer (“CPO”) Sarah Cunningham forwarded the Protest to you, Director Armstrong, via e-mail, on the day it was received, and requested delegation of DHS’s procurement decision to the Office of State Procurement (“OSP”). OSP accepted the delegation and set January 2, 2024, as the deadline for interested parties to submit a response to the Protest.

### **DHS’S RESPONSE TO DELTA DENTAL’S PROTEST**

#### **1. DHS has standing as an “interested party” to respond to the Protest.**

On December 27, 2023, Director Armstrong, via e-mail, invited CPO Cunningham to submit an argument supporting DHS’s standing to respond to the Protest. The email stated, “At first blush, it seems that the Department of Human Services is arguably not ‘a person named in an anticipation to award a contract.’ I am open to hearing what, if anything, DHS thinks should be made of that fact.” DHS welcomes the opportunity to clarify this important issue as yet not explicitly addressed.

Arkansas law provides that a person named in an ATA that is protested under Ark. Code Ann. § 19-11-244 may file a written response to the protest. Ark. Code Ann. § 19-11-244(a)(5)(A).

“Person” is defined as “any business, individual, union, committee, club, or other organization or group of individuals.” Ark. Code Ann. § 19-11-203(18). DHS is a person for purposes of responding to the Protest as it is “an organization.” An “interested party” when used in relation to a protest in connection with the award of a contract means “a bidder, offeror, or contractor who actually submitted a bid or offer or who holds a contract to provide the commodities or services solicited.” OSP Rule R1: 19-11-244.7. DHS is obviously not an anticipated awardee in this case, but it is indisputably an “interested party” as the holder of the contract being awarded. Therefore, DHS is necessarily a person named in a contract ATA. Additionally, by posting the notice of the ATA to its own website, DHS is “a person named in the anticipation to award a contract,” and is unequivocally an interested party from which a response to a protest attesting that it did not adhere to the rules of its own solicitation is warranted. The allowance of interested parties to provide a written response to a protest is not a new or rare practice as OSP has historically allowed the interested state agency to respond to protests in years past. What is perplexingly unprecedented is calling into question a state agency’s standing to even file a response to a protest, particularly when the protest alleges the agency acted in error. It is proper to accept DHS’s response because it has standing as an interested party and the information provides OSP with a more complete record from which to make its determination.

## **2. Timeliness**

The Protest was timely received by DHS on December 22, 2023, via hand delivery and e-mail. DHS does not dispute that the Protest was submitted timely. The Protest was received by DHS Secretary Putnam within fourteen (14) calendar days after the notice of ATA was published on the DHS website.

### **Reponses to Specific Allegations in the Protest**

#### **3. Delta Dental does not meet the criteria to claim to be an “aggrieved party” in connection with the award of a contract.**

##### ***a. Delta Dental does not meet the “aggrieved party” statutory definition as an awardee of the contract.***

Delta Dental argues in its Protest, “Despite being named as one of the awarded vendors, Delta Dental is . . . an aggrieved party . . .” Protest, 3. This argument is based on only one protest ground. “The director or the procurement agency failed to adhere to the rules of the procurement as stated in the solicitation, and the failure to adhere . . . materially affected the contract award.” Protest, 3 (See Ark. Code Ann. § 19-11-244(a)(4)(A)(iii)). Delta Dental claims to be an “aggrieved party,” however, it argues that Ark. Code Ann. § 19-11-244 does not define the term. Instead, Delta Dental cites Arkansas case law to craft its own definition of “aggrieved party” to mean a party that may suffer adverse financial consequences. See *Arkansas State Highway Comm. v. Perrin*, 240 Ark. 302, 306, 399 S.W.2d 287, 290 (Ark. 1966) and *Forrest Constr. Inc. v. Milam*, 345 Ark. 1, 7, 43 S.W.3d 140, 144 (Ark. 2001).

Delta Dental’s statement that “aggrieved party” is a statutorily undefined term in the procurement code is inaccurate. OSP Rule R1:19-11-244.1 provides the following definition:

“Aggrieved in connection with the award of the contract’ is the condition of being an actual bidder, offeror, or contractor who has been ***denied the award of a contract*** as the result of the improper or unlawful award of the contract.” (emphasis added). Delta Dental does not meet the qualifications of an “aggrieved party” according to Ark. Code Ann. §19-11-244(a)(1) and OSP Rule R1:19-11-244.1 because it was not denied the award of a contract. Delta Dental was in fact one of four bidders named in the ATA for RFP No. 710-23-0081. On this basis alone, the Protest should be dismissed. Without meeting the threshold of qualifying as an “aggrieved party,” Delta Dental has no standing to protest the ATA.

***b. Delta Dental is not aggrieved and the impact to its economic interests are speculative and based on equal division, not enrollment as stated in the RFP and thus, the impact is overstated.***

Delta Dental argues that DHS’s decision to award the Dental Managed Care contract to four vendors rather than two or three materially impacts its economic interests going forward relative to its status as one of two incumbent vendors engaged in the current Dental Managed Care contract. By the current contract’s end in May 2024, Delta Dental will have had the opportunity to earn \$629,545,363.28.

Delta Dental’s objection to the ATA naming four vendors boils down to its assumption that the distribution of enrolled members assigned to each contractor would be significantly reduced, therefore reducing the incumbent contractors’ economic interest in the new contract by half. The RFP states, “Arkansas residents eligible for Medicaid dental services are enrolled in a dental plan through the AR Medicaid Management Information System (MMIS) ‘Auto-Assignment’ feature or by selecting a plan during open enrollment through AR Foundation for Medical Care (AFMC) and are assigned a PCD [Primary Care Dentist] upon successful enrollment.” RFP, § 2.1, 17.

While it is possible that contracting with four vendors may initially reduce Delta Dental’s enrolled population, there is nothing in the description above that guarantees Delta Dental’s portion will be significantly impacted. Enrollees may choose to remain with the entity they are already familiar with, giving the incumbents an advantage. The fact that program recipients may enroll in the plan of their choice creates the equally possible scenario that more people may choose to enroll with Delta Dental’s plan as opposed to the other three contractors’ plans. Additionally, Delta Dental - like all awardees in the new contract - will have the opportunity to market its plan to all Arkansas beneficiaries, and the efficacy of those efforts is unknown at this point. Delta Dental’s argument that its economic interest in the new contract is reduced by half is pure speculation and based on a theoretical enrollment process that is not actually utilized by the RFP.

RFP Section 1.14.C required the submission of a “Written Statement by a qualified Actuary confirming the Per Member Per Month (PMPM) Composite rate bid,” and RFP Section 1.14.E required this statement “be included with the Cost Proposal Template.” The Protest states that Delta Dental “had actuaries review, validate, and sign-off on the proposed price. In both scenarios, the price proposal was based on an enrollment assumption that would be feasible in a two-vendor contract. *See* Protest, 6. Delta Dental’s proposed price of \$18.29 was certified by an actuary. *See* attached Delta Dental Pricing. Delta Dental fails to acknowledge two important facts in its Protest. First, three other bidders proposed the same price of \$18.29. Second, the content of the Milliman

letter included in the RFP Bidder's Library. *See* attached Official Bid Price Sheet. The Milliman letter states, "the final capitation rates for this period will be based on the RFP responses and will be within the bid rate changes noted in this letter, subject to additional relevant information becoming available that may require changes to the rates (e.g. legislative changes, significant market changes, program changes)." *See* attached Milliman Letter, 1. Milliman also noted that enrollment in dental managed care programs grew significantly during the public health emergency but have declined since, a phenomenon possibly attributable to "a higher prevalence of non-utilizers, changes in preventative care behavior post-PHE [public health emergency], and limited access to dental providers, among others. The risk corridor will help mitigate the risk associated with this uncertainty once member redeterminations are completed." *See* Milliman Letter, 1.

Delta Dental stated, "With Delta Dental being one of two vendors since 2016, it was confident that it could bid the minimum price under the new RFP and continue to provide a quality and efficient service to DHS and Medicaid recipients." Protest, 6. Delta Dental admitted that it developed its price proposal based on "an enrollment assumption that would be feasible in a two-vendor contract," even though it was aware that "OP intends to award a contract to multiple Contractors." Protest, 6, RFP § 1.3 A, 6.

Delta Dental relies heavily on its own theory that the new RFP is simply an extension of the current Dental Managed Care contract, however, "The primary objective of the new Request for Proposal (RFP) is to enhance the delivery of dental services to enrolled members . . . increase access to dental services, and ensure cost-effective utilization of resources." RFP, § 2.1, 17. This RFP is not simply an extension of the current contract; it is a distinct and new solicitation, and the resulting contract has explicit goals and requirements. Delta Dental purports on page 5 of its Protest that it submitted its proposal, including its pricing, based on it being one of two or three vendors if it were selected, but then goes on to state that "the price proposal was based on an enrollment assumption that would be feasible in a two-vendor contract." Protest, 6.

Delta Dental was aware the contract would be awarded to multiple contractors but consciously chose to base its price proposal on the structure of the current contract which involves only two contractors. That was a business decision entirely within Delta Dental's control. Delta Dental argues that its proposal would have been entirely different had it known that four vendors being awarded was a possibility, however it was aware that three vendors being awarded was possible and it did not make projections for that scenario.

Delta Dental does not meet the statutory definition of an "aggrieved person." The claims regarding future adverse financial impact are purely speculative and the computation of how the enrollment numbers will ultimately be divided is affirmatively inaccurate. Delta Dental's protest should be denied for lack of standing; or, in the alternative, Delta Dental's protest should be denied for lack of providing facts to substantiate its "aggrieved" status.

***c. DHS properly adhered to the rules of the procurement when awarding to all responsible vendors. Delta Dental's protest should be dismissed.***

Delta Dental asserts its grounds for protest under Ark. Code Ann. 19-11-244(a)(4)(A)(iii):

(iii) The director or the procurement agency failed to adhere to the rules of the procurement as stated in the solicitation, and the failure to adhere to the rules of the procurement materially affected the contract award;

The Protest identifies the language at issue located within the Introduction paragraph of the RFP, Section 1.1:

The Arkansas Department of Human Services (DHS or the Department), Division of Medical Services (DMS or the Division), **is planning to procure at least two, but no more than three Contractors** who will provide, through a managed care model, comprehensive Dental Services under Arkansas Medicaid. (emphasis added).

The specific phrase “planning to procure at least two, but no more than three,” signifies initial intention but does not create a rule by which DHS was bound within the RFP to adhere. More significant than the number of contemplated contractors is DHS’s use of the word “planning.” DHS could have used “will” or “shall” in place of “planning,” both of which impart a sense of certainty of action. The Oxford Dictionary lists the words “intend,” “expect,” “aim,” “envision,” “foresee,” and “contemplate,” as just a few examples of synonyms of “plan.” The Oxford New Desk Dictionary and Thesaurus 630 (3rd Ed. 2009). In addition, “planning,” when used as “intending to do something,” is defined as “to have in mind as a purpose or goal.” See [merriam-webster.com/thesaurus/planning](http://merriam-webster.com/thesaurus/planning). Contrastingly, the term “rule” is defined as a “principle to which an action conforms or is required to conform” or “custom; standard.” The Oxford New Desk Dictionary and Thesaurus 732 (3rd Ed. 2009). The phrasing used in the RFP is clearly not an absolute declaration or mandate and is located only within the Introduction paragraph. As evidenced by the foregoing, there is no reasonable basis to argue that DHS’s use of this phrasing created a rule binding the RFP.

In 2020, State Procurement Director Armstrong stated in a protest determination that “the term ‘rules of the procurement’ comes from Ark. Code Ann. § 19-11-244(a)(4)(A)(iii), which identifies one of the statutorily permissible grounds of a protest. This term is not given a special definition in Arkansas Procurement Law, so [he] allowed words to have their ordinary, everyday meaning. A principal meaning of the word ‘rule’ is a ‘prescribed guide for conduct or action.’ See Rule/Definition [www.merriam-webster.com/dictionary/rule](http://www.merriam-webster.com/dictionary/rule). In the context of the RFP, I understand provisions of an RFP that are prescribed guides for conduct or action to be ‘rules of the procurement.’” See OSP Protest Determination, in response to Protest of Award in RFP No. 710-20-0041 (December 15, 2020).

In reviewing the RFP documents, DHS adhered to the rules of procurement by awarding to all responsible vendors. RFP Section 1.3 A states, “As a result of this RFP, OP intends to award a contract to multiple Contractors.” Further, the Award Process outlined in RFP Section 1.20.D.3 states, “DHS reserves the right to award multiple contracts.” See also the Standard Terms and Conditions section which states, “Acceptance and Rejection: **The State shall have the right to accept** or reject all or any part of a bid or **all bids**, to waive minor technicalities, and to award the bid to best serve the interest of the State.” RFP § 5.2, 106 (emphasis added).

When reviewing the remainder of the RFP sections prior to posting the ATA, DHS stayed within the prescribed guide, or rule, set forth under the Principles and Guidelines, RFP Section 2.5, specifically to promote:

“Improved Access to Dental Care: DHS is seeking to expand access to dental care by ensuring the DMOs provide medically necessary covered services to enrolled members beginning on the member’s date of enrollment, regardless of pre-existing conditions or receipt of any prior health services. DHS will require DMOs to ensure at least 95% of enrolled members have access to PCDs within 30-60 miles of their residence ensuring that DMOs have network adequacy.”

Proposals are evaluated and scored according to evaluation criteria stated in Section 3 of the RFP. The information categories subject to scoring and the point values associated with each category are identified in Table 6: Evaluation Scoring Methodology. RFP § 3.2.JJ, 101. This section is expanded into greater detail in the RFP Attachment – Technical Proposal Packet. Of note, the evaluation criteria include no limit on the number of vendors who may receive the award. Three out of the four vendors bid the same price. The tabulation of scores resulted in only a 15-point margin between the highest and lowest bidders. DHS weighed each bidder’s score against the underlying guiding principle stated above and in its business judgment, determined the best way to achieve the goal of scaling services and increasing access to all Arkansans was to award the contract to all four vendors.

The Protest also includes transcribed testimony from the Arkansas Legislative Council Review Subcommittee meeting held December 12, 2023, including commentary from DHS personnel and Office of State Procurement Director, Ed Armstrong. The substance of the transcribed testimony does not constitute facts to substantiate Delta Dental’s grounds for protest as required by OSP rules. “A party submitting a protest has the burden of stating facts showing that the protestor has Grounds in connection with a solicitation or in connection with the award of a contract.” *See* OSP Rule R3:19-11-244.

Delta Dental acknowledges that “DHS conducted an effective evaluation that followed the requirements set forth in the RFP and properly reviewed and scored each respective bidder’s proposal.” Protest, 5. Yet Delta Dental contends that the contract “should be awarded to the two vendors who differentiated themselves through compelling and compliant technical and price proposals.” Protest, 5. DHS reiterates that the decision to award the contract to multiple vendors adheres to the RFP rules. As three of the four vendors bid the same price and the vendor scores were substantially similar, awarding the contract to multiple vendors is in the best interest of the State and in alignment with the State’s goal of improving access to dental care for Arkansans.

***d. Best interests of the State***

The fundamental purpose of this RFP is to provide Medicaid eligible Arkansans with improved access to dental care. As referenced above, one of the specific goals of this new contract is to ensure that at least 95% of enrolled members have access to PCDs within 30-60 miles of their residence. This is an important concern for a state with a largely rural population. The RFP

specifically states, “this document identifies new or updated requirements that must be implemented to continue to improve the quality and services for the State.” RFP § 2.1, 17.

Delta Dental asserts that having four contractors under the Dental Managed Care Program is averse to the best interests of the State of Arkansas and program stakeholders. While not a permissible protest ground under Ark. Code Ann. § 19-11-244, DHS submits the following in response to these allegations.

Delta Dental contends that Arkansas is deviating from national precedent by awarding a contract to more than two vendors and speculates that states of similar size contract with no more than two vendors “likely due to the financial and operational considerations associated with the enrollment and oversight of each Dental Managed Care Organization (“DMCO”).” Protest, 7. Delta Dental does not offer any objective evidence supporting its claims. Moreover, DHS cannot speculate as to the rationale used by another state in its awarding of a specific contract. DHS is committed to providing Arkansans with improved dental care across the state in accordance with the RFP guidelines. Awarding the contract to four vendors is in the best interest of Arkansans given the competitive bids received under this RFP.

Delta Dental asserts that moving from two to four vendors will increase the administrative burden on DHS and DMCO stakeholders. Delta Dental does not provide evidence to substantiate the claims that DHS would be unable to maintain its regular course of business processes or manage the oversight of four versus two vendors. DHS is committed to managing this contract to the best interests of all parties, including the beneficiaries and the state’s fiscal reserves, and will provide staff as appropriate to ensure the resources and personnel requirements satisfy the demands of the contract. While dental providers may face administrative challenges typical for this type of increase, there is no indication the introduction of two additional DMCOs will be unduly burdensome for stakeholders.

Delta Dental asserts that enrollee confusion and disengagement from mass reassignment is a distinct possibility if DHS proceeds with four vendors. Again, Delta Dental’s claim is unsubstantiated. DHS reiterates that enrolled members retain the right to choose another DMCO within ninety (90) calendar days of Auto Assignment. *See* RFP § 2.7.3.JJ. If a member wishes to remain with or transfer to a specific vendor, they are free to do so. Delta Dental’s concern here is merely speculative and DHS is confident in its ability to manage the administrative challenges that may arise from an increase in vendors.

#### **4. CONCLUSION**

Delta Dental’s protest should be denied in its entirety for the reasons and arguments set forth above. DHS adhered to the rules of the RFP and should be allowed to move forward with the awardees to finalize the contracts.

Sincerely,

*/s/ Dixie M. Quinn Nelson*

Dixie M. Quinn Nelson  
Attorney Specialist  
Office of Chief Counsel, DHS

cc: Secretary Kristi Putnam, Department of Human Services  
[Kristi.Putnam@dhs.arkansas.gov](mailto:Kristi.Putnam@dhs.arkansas.gov)

Secretary Leslie Fiskem, Department of Transformation and Shared Services  
[Leslie.Fiskem@arkansas.gov](mailto:Leslie.Fiskem@arkansas.gov)

Delta Dental Plan of Arkansas, Inc.  
Mark Hodge, [mhodge@barberlawfirm.com](mailto:mhodge@barberlawfirm.com)

Liberty Dental Plan of Arkansas, Inc.  
Erika Gee, [EGee@wlj.com](mailto:EGee@wlj.com)

DentaQuest National Insurance Company, Inc.  
[brittany.gray@dentaquest.com](mailto:brittany.gray@dentaquest.com)

MCNA Insurance Company  
[slepage@mcna.net](mailto:slepage@mcna.net)

Jim Brader, Chief Counsel, Department of Human Services  
[Jim.brader@dhs.arkansas.gov](mailto:Jim.brader@dhs.arkansas.gov)