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VIA Email: Edward.Armstrong@arkansas.gov

Confirmed by Hand Delivery

Mr. Edward Armstrong, Director
Office of State Procurement
Department of Transformation and Shared Services
501 Woodlane St, Suite 220
Little Rock, AR 72201

RE: Response to Bid Protest
Solicitation No. 710-23-0081
Dental Managed Care

Dear Director Armstrong:

I am writing as counsel for Liberty Dental Plan of Arkansas, Inc. (“Liberty”) in response to the bid protest filed by Delta Dental Plan of Arkansas, Inc. (“Delta”) regarding the above-referenced solicitation. This response is submitted to you pursuant to Ark. Code Ann. § 19-11-244 and in your capacity as Director of the Office of State Procurement (“OSP”), on the agreed-upon deadline of January 2, 2024.

I. Applicable Standards

Procurement statutes and regulations are intended to “assure economy in public administration and honesty, fidelity and good morality in public officials and to protect the public against favoritism, improvidence, extravagance, corruption, imposition, fraud, collusion and extortion by promoting actual, honest and effectual competition.” *Davis v. Jerry*, 245 Ark. 500, 512, 432 S.W.2d 831, 837 (1968) (dissent). They ensure “that all who may wish to bid shall have a fair opportunity to compete in a field where no favoritism is shown or may be shown to other contestants.” *Metro. Exp. Services, Inc. v. City of Kansas City, Mo.*, 23 F.3d 1367, 1371 (8th Cir. 1994).

Arkansas law specifically directs that the provisions of Arkansas Procurement Law are to be "construed liberally and applied to promote its underlying purposes and

policies[.]” which are to: “(1) Simplify, clarify, and modernize the law governing procurement by this state; (2) Permit the continued development of procurement policies and practices; (3) Provide for increased public confidence in the procedures followed in public procurement; (4) Ensure the fair and equitable treatment of all persons who deal with the procurement system of this state; (5) Provide increased economy in state procurement activities by fostering effective competition; and (6) Provide safeguards for the maintenance of a procurement system of quality and integrity.” Ark. Code Ann. § 19-11-209(1); §19-11-202.

With regard to bid protests, an “actual bidder, offeror, or contractor who is aggrieved in connection with the award of a contract may protest” by stating at least one statutory ground for a protest and stating “facts that substantiate each ground on which the protest is based.” Ark. Code Ann. § 19-11-244.

II. Summary

Delta asserts a single statutory ground for its protest: the “director or 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 procurement materially affected the contract award.” Ark. Code Ann. § 19-11-244(a)(4)(A)(iii). Specifically, Delta protests that the procurement agency, the Department of Human Services (“DHS”), violated a “rule” of the procurement by announcing its intention to award a contract to four bidders.

Here, Delta has failed to establish its right to protest and has failed to establish that DHS failed to follow any rule of the procurement. Further, even if any such failure had occurred, it would have been a minor technical irregularity which may be waived. Therefore, Liberty respectfully contends that Delta’s bid protest should be denied.

III. Argument

First, Delta has not shown that it has standing to file a bid protest as an “aggrieved party” in this solicitation, as required by Ark. Code Ann. § 19-11-244. In its protest, Delta correctly points out that “aggrieved party” is not defined by statute. *See* Delta Protest, at p. 5. However, Delta then offers irrelevant case law in support of its theory that “aggrieved party” means nothing more than a party who “may suffer an adverse financial consequence.” *Id.* Neither one of the two cases cited by Delta for this proposition in fact reach such a broad conclusion, but regardless, they are irrelevant to the matter at hand as neither one involves a procurement or even an administrative determination.

Further, as Delta was a successful bidder in this solicitation, it strains credulity to say that it is “aggrieved” by the anticipation to award. From the arguments in its protest, Delta is clearly aggrieved with the state’s decision to increase competition in its dental managed care program by expanding it beyond the two incumbent contractors, arguing that the decision “effectively halves” Delta’s current membership. *Id.* at 6. However, the decision to add on to the incumbent contractors is purely the state’s prerogative and is not subject to Delta’s approval or agreement. Delta’s unhappiness with the state’s structure of the program does not make it an “aggrieved party” for these purposes. Finally, any argument that Delta would be adversely financially affected by moving from three to four contractors is mere speculation at this point and cannot serve to establish standing.

For these reasons, Delta has failed to establish standing to file this bid protest.

Secondly, Delta has failed to establish that any violation of the rules of the procurement occurred. Delta’s protest repeatedly quotes from the introductory section of the solicitation, which states that DHS “is planning to procure at least two, but no more than three Contractors” to provide dental managed care services. RFP at 1.1. But, tellingly, out of a 108-page solicitation with 17 attachments, 1 addendum and a 15-exhibit Bidder’s Library, Delta is unable to unearth any other statement in support of its assertion that this introductory throwaway statement is actually a “rule of the procurement.”

In fact, there are three other sections establishing the rules and procedures to be followed in this solicitation that put the lie to Delta’s position. First, in §1.3 on p. 6 of the solicitation, DHS clearly states that: “As a result of this RFP, **OP intends to award a contract to multiple Contractors.**” [emphasis added]. This intention is repeated again in § 1.20(D)(3) on p. 12, when DHS describes the award process, stating: “DHS reserves the right to award **multiple contracts.**” [emphasis added]. Finally, in §3.3 on p. 102, DHS provides that the top “four contractors” may be considered further after technical scoring.

In sum, the solicitation clearly contemplates and allows DHS to award “multiple” contracts and that is precisely what it decided to do here. There was therefore no violation of the rules of the procurement and the protest should be denied. However, even if one were to accept the idea that the introductory statement is the only statement regarding multiple contracts which may be considered a “rule,” Delta’s argument should still be denied.

As provided in OSP Rule R7:19-11-230(a): “There is a strong public interest in favor of conserving public funds in awarding public contracts, and little, if any, public benefit in disqualifying proposals for technical deficiencies in form or minor irregularities where the offerer does not derive any unfair competitive advantage

therefrom. The State Procurement Director or agency procurement official may waive technicalities in proposals or minor irregularities in a procurement which do not affect the material substance of the Request for Proposals when it is in the State's best interest to do so." This rule recognizes that the overall purpose of procurement law is to carry out the best interest of the state while treating each bidder fairly. Here, no party is unfairly prejudiced by disregarding the state's possible misstatement in its introduction, particularly when that statement is in conflict with the remainder of the solicitation's provisions and the state's best interests. If there was any error made here, it is minor and should be waived.

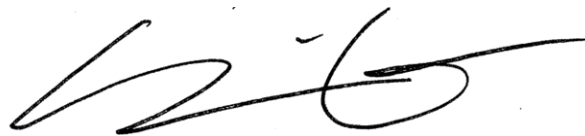
IV. Summary

Liberty respectfully submits that the bid protest should be summarily denied in its entirety on the basis of the record. However, if the Director wishes to grant Delta's request for a meeting to discuss the matter, Liberty requests that it also be given the opportunity to attend and participate in the meeting.

We look forward to your decision.

Respectfully yours,

WRIGHT, LINDSEY & JENNINGS LLP



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