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December 22, 2023

HAND DELIVERED AND VIA EMAIL

Honorable Kristi Putnam
Secretary
Arkansas Department of Human Services
700 Main Street
Little Rock, AR 72203-1437
kristi.putnam@dhs.arkansas.gov

Re: Protest of Anticipation to Award;
Solicitation No. 710-23-0081

Dear Secretary Putnam:

Our firm has been retained by Delta Dental Plan of Arkansas, Inc. ("Delta Dental") an Arkansas nonprofit corporation, to protest the Anticipation to Award issued by the Arkansas Department of Human Services ("DHS") related to Request for Proposal No. 710-23-0081 (the "RFP") for the next generation Arkansas Medicaid Dental Managed Care Services contract. The Anticipation to Award was published on Friday, December 8, 2023, and this protest is being lodged on Friday, December 22, 2023, which is within the fourteen (14) day protest period provided under Ark. Code Ann. § 19-11-244.

I. FOIA Request.

On Wednesday, December 13, 2023, I submitted a request under the Arkansas Freedom of Information Act (Request No. 23-1190) seeking public records pertaining to the RFP and the Anticipation to Award. Some responsive documents were provided by DHS on Monday, December 18, 2023. The documents provided by DHS related solely to the scorers and the scoring of the proposals submitted in response to the RFP. I followed up on my original request seeking other responsive documents (Request No. 23-1216) that were requested in my original request. Two additional

documents were received on December 19, 2023. It is my understanding, based upon correspondence with Debbie Buzzitta, DHS FOIA Program Manager, that the IT program necessary for DHS to search its e-mails and perhaps other records was malfunctioning. Ms. Buzzitta let me know that DHS would run the searches necessary to respond to my requests once the necessary program was functioning. On December 22, 2023, the day of the protest deadline, DHS provided some additional documents. I am reviewing these documents with my client. I expect to submit a follow-up FOIA request because the production received this morning included several e-mails with attachments, none of which were included in the provided documents.

This protest, at least in part, is based upon the information contained in the documents provided by DHS prior to December 22, 2023 in its partial responses to my FOIA requests. Once the attachments to the e-mails and any other documents responsive to my FOIA requests are received and reviewed, Delta Dental reserves the ability to supplement this protest in a timely manner.

II. Background of Dental Managed Care Contract.

Delta Dental and one other vendor were awarded the Medicaid Dental Managed Care contract in 2016. Since that date, approximately 630,000 Arkansans have participated in the dental program, and Delta Dental has successfully managed more than 383,000 Medicaid beneficiaries.

As one of the current contractors, Delta Dental has facilitated a well-run program that has met or exceeded the requirements set forth by DHS and has effectively served all stakeholders. Notably, Delta Dental has collaborated with DHS to improve the Medicaid Managed Care dental program through tailored strategies, such as:

1. Reducing the administrative burden on dental offices, resulting in increased participation in the Medicaid program, leading to an expanded network of providers and increased access to care for Arkansans as well as a Delta Dental Medicaid provider network that has exceeded most requirements each year.
2. Conducting extensive outreach and education initiatives to educate Medicaid beneficiaries and other stakeholders and increase utilization rates in the state.
3. Establishing operations to enable high-quality services for all stakeholders and effectively managing full scope of claims (2M+) and calls (200K) with high satisfaction rates.
4. Implementing systems to detect and eliminate fraud, waste, and abuse that, prior to its contract, was prevalent and led to increased costs for Arkansas taxpayers.

Delta Dental is an experienced incumbent that understands the nuances of this program and how to effectively meet the needs of all stakeholders. Delta Dental's proven past performance demonstrates it has valuable perspective to be considered as it relates to the future of the Dental Managed Care Program in Arkansas.

III. Protest Basis and Argument.

Delta Dental files this protest based upon the Anticipation to Award for the Dental Managed Care Program, in which DHS awarded the contract to all vendors who participated in the competitive procurement process. Despite being named as one of the awarded vendors, Delta Dental is protesting as an aggrieved party due to the impacts of a four-vendor award decision which fails to adhere to the procurement rules set forth in the RFP and the results of the evaluation conducted by DHS.

A. Grounds for Protest.

Arkansas law sets forth specific grounds which allow for aggrieved parties to file a procurement protest. Delta Dental files this protest pursuant to the following enumerated ground:

(4) A protest submitted by an aggrieved person under this section shall:

(A) Be limited to one (1) or more of the following grounds:

* * *

(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; . . .

Ark. Code Ann. § 19-11-244(a)(4)(A)(iii). DHS chose to include the following language in the RFP:

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.

The RFP stated that DHS sought to foster competition between two or three managed care vendors, not four. Delta Dental believes in its service model and welcomes such competition and submitted its proposal based on the competitive bid and evaluation process contemplated under the terms of the RFP.

At the December 12, 2023, Legislative Review conducted before the Arkansas Legislative Council Subcommittee, DHS's extension of the existing Dental Managed Care contract was reviewed. DHS was represented at the Review hearing by Mitch Rouse, Chief of Staff, Nell Smith, Deputy Director of the Division of Medical Services, and Janet Mann, Deputy Director of

Programs and Medicaid Director. When questioned by the Chair of the Subcommittee, Ms. Smith testified that there was a pending Anticipation to Award naming all four of the bidders that submitted proposals in response to the current RFP as awardees. Further, Ms. Smith testified that the rationale for going to four vendors was because the “bids were very close on numbers and there was not a break.”

Senator Flippo questioned whether one of the four “winning vendors” would be able to protest the award. Ed Armstrong, State Procurement Director with the Office of State Procurement, then came forward to address Senator Flippo’s question. Mr. Armstrong stated that an “aggrieved party” can protest under State law. Senator Hammer then asked Mr. Armstrong, “[a]re procurement laws allowed for DHS to have this kind of latitude to arbitrarily go from two to four and why would not a top bidder win it as long as they can meet the specifications given.” Mr. Armstrong and Senator Hammer proceeded to have the following exchange:

Mr. Armstrong: Senator Hammer, I am not going to assume any arbitrariness. What I will say is that the statutes provide that contracts are awarded based on consideration of the evaluation criteria that are stated in the RFP and consideration of discussions and price. And discussions can include negotiations, clarification, and our rules make clear that those are two types of discussions, but they are not exclusive. So after discussing with vendors and considering price and the evaluation factors, the rules on negotiation say that an agency can - basically they can negotiate and discuss as provided for in the RFP. So, if their RFP, for example, provided for award to four vendors, then they could award up to four vendors.

Sen. Hammer: So, if six, eight, ten would have come in close, based on what’s been shared, . . . it could have been as many as would have come in. Would that have been a possibility?

Mr. Armstrong: It would depend on the language of the RFP and what it allowed, because that kind of sets - in addition to the statutes and rules, then the RFP kind of becomes its own ad-hoc rules if you will. If an RFP says we’re going to look at the top five vendors or the top eight - they can use their business judgment - any agency could - to set up an RFP. But, once they’ve set the rules in the RFP, that’s where they lose discretion.

Mr. Armstrong’s testimony at the Legislative Review Subcommittee meeting is directly on point with the protest being filed by Delta Dental. Once DHS published (and did not timely

modify) the RFP, it lost discretion to deviate from selecting either two or three vendors under the RFP. The State Procurement Rules for Competitive Sealed Proposals require that “[t]he evaluation shall be based on the evaluation factors set forth in the Request for Proposals.” R5: 19-11-230. Whether the bids were closely scored is immaterial to the requirements of the RFP and the resulting proposals that the bidders submitted to DHS. Notably, the range and proximity of the bidder’s scores of this 2023 evaluation were not materially different than those in the 2016 evaluation for the original Dental Managed Care Contract, where DHS awarded the contract to the top two bidders, not three or four. DHS controlled its own procurement, and, subject to state law, could set out the criteria it deemed important through the issuance of the RFP. DHS did so, and published that contracts would be issued to two or three vendors. Delta Dental submitted its proposal, including its pricing, based on it being one of two or three vendors if it were selected. No basis under Arkansas law, the procurement rules, or the RFP allows for DHS to deviate from the clear requirement of the RFP, which does not permit an award to all four bidders.

Furthermore, DHS conducted an effective evaluation that followed the requirements set forth in the RFP and properly reviewed and scored each respective bidder’s proposal. The evaluation results identified two distinct vendors, with a scoring differential between vendor scores similar to the 2016 evaluation for the original Dental Managed Care contract. Given that the basis of the four-vendor award is incongruent with the RFP language and authority provided to DHS, the award decision cannot stand. An appropriate award decision should reflect the results of DHS’ evaluation and be awarded to the two vendors who differentiated themselves through compelling and compliant technical and price proposals.

B. Delta Dental is an Aggrieved Party.

While Ark. Code Ann. § 19-11-244 does not define the term “aggrieved party,” the Arkansas Supreme Court has recognized that a party that may suffer an adverse financial consequence qualifies as an aggrieved party. *See Arkansas State Highway Comm. v. Perrin*, 240 Ark. 302, 306, 399 S.W.2d 287, 290 (Ark. 1966) (“The Highway Commission certainly meets the definition of an ‘aggrieved party,’ for it has a pecuniary interest.”) (internal citation omitted) and *Forrest Constr., Inc. v. Milam*, 345 Ark. 1, 7, 43 S.W.3d 140, 144 (Ark. 2001) (“[A] party is aggrieved and thus has standing to appeal if the trial court’s order has impaired his economic interests.”).

The decision to award the Dental Managed Care contract to four vendors materially impacts Delta Dental’s economic interests in relation to the current program where it serves as one of two contractors and the intent that was set forth in the RFP to continue a like construct. Delta Dental reasonably relied upon the specific terms of the RFP and other documents provided in the solicitation to prospective bidders when developing its technical and price proposals. Therefore, the basis of its approach and assessment of the opportunity to continue serving as a contractor for the Dental Managed Care contract were based on DHS’s stated intent “...to procure at least two, but no more than three Contractors.” DHS clearly contemplated two, possibly three, contractors, but not a four-vendor contract award.

Notably, a four-vendor contract significantly impacts the enrollment per contractor, which is the most impactful aspect of the contract as it dictates the operations, financial viability, and economic interest of each vendor. The RFP states that “[DHS] currently contracts to provide managed care dental services to approximately 630,000 enrolled Medicaid and Child Health Insurance Program (CHIP) members.” RFP, § 1.1, p. 17 of 108. If DHS had awarded the contract to the number of vendors as provided for in the RFP, each vendor would be responsible for between approximately 210,000 and 315,000 Medicaid Beneficiaries. The decision to move to a four-vendor contract has reduced the size and scale of the program to be administered by each vendor from what bidders contemplated in crafting their proposals, which were based on the explicit language of the RFP. Further, that decision effectively halves the current financial and economic interest in the contract for the incumbent contractors. As discussed in more detail below, this is not only due to the reduced capitated payments received for a smaller population, but also due to the misalignment of Delta Dental’s proposed operational construct compared to the significantly smaller population based on DHS’s decision to award four vendors.

The RFP required that all bidders’ pricing “fall within the Per Member Per Month Composite Rate Range of \$18.29 - \$19.25.” Delta Dental submitted a price proposal of \$18.29 based on its financial analysis and informed by its past performance as the current contractor of the Dental Managed Care Contract. 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.

In addition, Delta Dental had independent 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. Delta Dental is aggrieved due to DHS’s violation of the terms of the RFP and the reduced size and scale of its program resulting from a smaller enrolled population that is misaligned from the per member per month rate that was included in the proposal.

More importantly, Delta Dental is economically impacted as the operational design of the organization that was included in the technical proposal of the bid is no longer aligned to the size and demand of the population it is serving. DHS’s deviation from the requirements of the RFP and the award to four vendors has a substantial impact on the number of enrollees that each vendor will serve, and correspondingly, the pricing, workforce, and service requirements that were included in Delta Dental’s response to the RFP. Delta Dental would have modified aspects of the technical design of its proposal and the operational design employed for the current contract on which the proposal is based if a four-vendor contract was perceived as a possibility during the procurement process.

C. Best Interest of the State and Program Stakeholders.

Above, Delta Dental explains how allowing all four bidders to contract as vendors under the Dental Managed Care program adversely impacts its interest. Delta Dental also asserts that having four contracts under the program will materially and adversely affect the interest of all other stakeholders of the Dental Managed Care program, including Arkansans, DHS, and the dental providers, which in turn materially affects the contract award.

Increasing the number of Dental Managed Care program vendors from two to four will result in an increase in the DHS resources needed to oversee the program as well as the costs associated with the program, while challenging national precedent for Medicaid Dental Managed Care contracts.

Through the Anticipation to Award to four vendors, the State of Arkansas is deviating from national precedent set in states that carve-out Medicaid dental benefits. In such states where the number of people enrolled in Medicaid is similar to Arkansas, those states contract with no more than two vendors. The decision to limit the number of vendors in those states is likely due to the financial and operational considerations associated with the enrollment and oversight of each Dental Managed Care Organization (“DMCO”). In the very small number of states where there are three DMCOs, the total number of enrolled beneficiaries is exponentially higher than in Arkansas.

Moving from two to four vendors will essentially double the resource and personnel requirements for DHS, as the RFP calls for DHS to perform the following tasks related to each, separate vendor:

- DHS staff must complete four concurrent readiness reviews in advance of the anticipated May 2024 contract start. RFP Section 2.12.6, p. 80 of 108;
- DHS staff must manage four vendors’ scope of services in support of the Medicaid Managed Care Contract, including ongoing reviews and approvals set forth in the RFP, including, but not limited to:
 - Review and approve submitted Network Provider Agreements from four vendors (RFP Section 2.9.1.A.1, p. 41 of 108);
 - Review and approve all marketing materials and plans from four vendors at least 10 days prior to use throughout the entirety of the term (RFP Section 2.8.1.5, p. 25 of 108);
 - Review and approve Enrolled Member Handbooks from each vendor, including subsequent reviews prior to changes being implemented (RFP Section 2.8.1.E.9, p. 29 of 108);
 - Review and approve Provider Manuals from each of the four vendors, (RFP Section 2.9.1.F.4, p. 30 of 108); and
 - Review and approve an annual Cultural Competency Plan from each vendor (RFP Section 2.8.3, p. 33 of 108).

- In addition to the additional workforce requirements that will be necessitated by DHS having four vendors, the State will also incur additional costs associated with the following:
 - Additional costs associated with contracting with an External Quality Review Organization vendor to complete four unique annual audits; and
 - Additional costs associated with four system implementations for systems explicitly set forth by the RFP requirements.

An award to four vendors also harms the other stakeholders in the program. Regarding dental providers, the introduction of two more DMCOs will only aggravate the administrative challenges Arkansas dental offices face in contracting with additional insurers, particularly given that most Arkansas providers are small businesses that may already struggle with these challenges. These challenges could dissuade dental providers from credentialing with the program at all, or, at minimum, limit dental provider participation with contractors' networks, creating access to care issues for the Medicaid population.

Enrollee confusion and dis-engagement is a distinct possibility if four vendors are allowed to go forward. Currently, two of the selected vendors have dental managed care contracts with DHS. Current enrollees have been serviced by these vendors for the past several years, with positive results. If four vendors are allowed to go forward with the contracting process, this will result in a substantial percentage of enrollees being re-assigned to a new vendor.

This mass re-assignment is likely to result in confusion in the enrollee population. Spreading enrollees over four vendors will increase the likelihood of such confusion and place more burden on DHS to ensure each vendor assumes a consistent level of risk and reduce negative impacts to beneficiaries being disenrolled and re-enrolled. Given DHS's recently completed redetermination efforts, any such mass disenrollment and re-enrollment runs the risks of harming the public's trust in the program.

The above-outlined challenges are a result of DHS's decision to award to all four vendors despite the RFP's language and not only adversely affect Delta Dental's interest but that of the program as a whole, which in turn materially affects the contract award. These burdens on all stakeholders (including the State itself) would be alleviated if DHS contracts with the two vendors who were evaluated as best suitable to meet the requirements set forth in the RFP.

D. Relief Requested.

Delta Dental files this protest in good faith and for the purpose of seeking a ruling by the Director that the Anticipation to Award contracts to all four bidders that responded to the RFP for the next generation Dental Managed Care program violates Section 1.1 of the RFP. If allowed to move forward, this award will have an adverse impact on the interest of Delta Dental. Likewise,

as discussed above, Delta Dental believes having four vendors involved in the program is not in the best interest of Arkansans, the State, or the stakeholders in the program. Equally, Delta Dental believes DHS administered a fair and proper evaluation process where two vendors distinctly separated themselves from the others in scoring, demonstrating they are most aptly qualified to serve our Arkansas community.

Delta Dental believes its protest to be well-founded under applicable law and asks that the Anticipation to Award be modified to comply with the terms of the RFP and reflect the evaluation results that identified two bidders with the highest "Grand Score Totals" following a compliant procurement process.

Rule 1, 19-11-244 of the Arkansas State Procurement Rules (2005-5) states:

After submittal of a timely protest and prior to issuance of a written decision to that protest, the protestor shall be afforded an opportunity to discuss with the Director or head of a procurement agency the issues giving rise to the protest.

Delta Dental stands ready to schedule such meeting at your convenience. Please let me know when works best for your schedule.

Thank you for your consideration of this protest. Please do not hesitate to let me know if additional information or documentation is needed as you review this matter.

Sincerely,

BARBER LAW FIRM, PLLC


Mark W. Hodge

MWH/lh

cc:

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(HAND DELIVERED and VIA EMAIL)

Notice to other bidders named in Anticipation to Award pursuant to Ark. Code Ann. § 19-11-244(a)(2)(B):

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